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Christopher Hubbard
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1968 Nuclear Non-Proliferation Treaty

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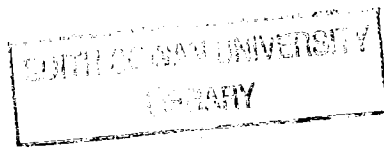
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**From Ambivalence to Activism: Australia and the
Negotiation of the 1968 *Nuclear Non-Proliferation*
*Treaty***

by

Christopher Hubbard B. A. (Hons.)

*A thesis submitted in fulfilment of the requirements for the degree of
Doctor of Philosophy (Interdisciplinary)
Faculty of Business and Public Management
Edith Cowan University (November 2001)*

DEDICATION

To my father, Michael John Hubbard, who brought me this far, and to my
brothers, Paul and Richard, who came with me.

"Salus populi suprema est lex"

Marcus Tullius CICERO (106-44 BCE)

ABSTRACT

This Dissertation presents a study of Australia's involvement in the negotiation and early interpretation of the 1968 *Nuclear Non-Proliferation Treaty* (NPT), an instrument which remains the most important global nuclear arms control measure in international law. Using data from recently released Australian government documents, the study analyses the process by which Australia was transformed from an ambivalent nuclear sceptic within the Western alliance, into a steadfast global campaigner against the spread of nuclear weapons. It concludes that Australia's urgent search during 1967 and 1968 for coherence in its policy on nuclear weapons acquisition, largely played out within sections of the Australian bureaucracy and political leadership, was not only the catalyst for that transformation, but also an important step in Australia's search for "middle power" status in both a regional and wider sense.

The study uses an interdisciplinary theoretical model which asserts the complementary nature of international law and international relations theory in explanations of relations between states. That model proposes that each discipline is capable of enhancing the insights of the other, in order to account - more closely in concert than each does individually - for the rule-following behaviour of nation-states.

Beginning in Chapter One with a critique of the NPT and the regime of institutions and understandings which surround it, the study moves, in Chapter Two, to a review of the domestic and international context in which Australia's nuclear weapons policy debate was conducted, while introducing the elements of division within the Australian federal bureaucracy which largely prosecuted that debate.

Chapters Three and Four analyse the debate in detail, concluding that its inconclusive result induced Australia's refusal to agree to America's request for immediate accession to the NPT. This, in turn, resulted in Australia exercising, through its recalcitrance, disproportionate influence over the US on the interpretation of the terms of the treaty.

Chapter Five moves analysis to the international arena, and the forum of the United Nations General Assembly, in which Australia finally found the

limit of America's willingness to accommodate the concerns of a small but significant Western ally located in a region of strategic importance.

Chapter Six examines the process by which Australia's influence over the US on the interpretation of the terms of the NPT was translated into guidance to other nuclear threshold states through the Western alliance. It also examines the level of influence exerted by Australia through its bilateral discussions with other states over the terms of the treaty. It concludes that Australia, mainly through the former process, could claim a significant role in the formulation of the world's most important multilateral nuclear convention through its insistence on interpretative clarity.

Finally, the study draws general conclusions on the significance of Australia's nuclear weapons debate for its aspirations to "middle power" status. It concludes that its indisputable leadership role, after 1972, in global nuclear disarmament efforts of many kinds, is an example of that status. Its most important theoretical conclusion concerns the demonstrated utility of an interdisciplinary model for the study of relations between states.

DECLARATION

I certify that this thesis does not, to the best of my knowledge and belief:

- (i) incorporate without acknowledgment any material previously submitted for a degree or diploma in any institution of higher education;
- (ii) contain any material previously published or written by another person except where due reference is made in the text; or
- (iii) contain any defamatory material.

Signature

Date 8/4/02

ACKNOWLEDGEMENTS

I owe a debt of gratitude to many people. Most importantly, I offer my sincere thanks to my two Supervisors, Dr. Gail Lugten and Dr. Alan Tapper, without whose wise, enthusiastic and steady guidance this work could not have been accomplished. I would also like to acknowledge the cheerful and professional assistance of the staff of the Edith Cowan University Library who answered my many questions.

From outside the university community, the staff of the Australian Archives in Perth and Canberra were unfailingly helpful in their advice and assistance, while Gough Whitlam and Sir Charles Court contributed useful insights from an entirely different perspective.

Finally, I would like to acknowledge the immense support of my family and friends, on both sides of the continent, for my work. Their steadfast encouragement in my endeavours has been more important than they will ever know.

TABLE OF ABBREVIATIONS

AAEC	Australian Atomic Energy Commission
ACDA	United States Arms Control and Disarmament Agency
AJIL	American Journal of International Law
ANZUS	<i>Security Treaty between Australia, New Zealand and the United States of America, 1952</i>
ASIO	Australian Security Intelligence Organisation
ATS/Aust. TS	Australian Treaty Series
CD	Conference on Disarmament
Cm; Cmnd.	United Kingdom Command Papers
Consol. TS	Consolidated Treaty Series
CTBT	Comprehensive Test Ban Treaty
DEA	Australian Department of External Affairs
ENDC	Eighteen Nation Disarmament Committee
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ILM	International Legal Materials
NPT	<i>1968 Nuclear Non-Proliferation Treaty</i>
NPTREC	1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons
NSG	Nuclear Suppliers Group
NNWS	Non-Nuclear Weapon State
NWS	Nuclear Weapon State
PCIJ	Permanent Court of International Justice
TIAS	Treaties and Other International Acts Series
UKTS	United Kingdom Treaty Series
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
USAEC	United States Atomic Energy Commission
USTS	United States Treaty Series

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Convention on the Prevention and Punishment of the Crime of Genocide, 1948 [78 *UNTS* 277].

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993 [*Misc.* 21 (1993) *Cm.* 2331; 32 *ILM* 800].

Final Act of the Conference on Security and Co-operation in Europe, 1975 [14 *ILM* 1292].

Geneva Conventions I-IV, 1949 [*UKTS* 39 (1958), *Cmnd.* 550; 75 *UNTS* 3].

Model Protocol Additional to the Agreements(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards, 1997 [INFCIRC/540, September, 1997].

Montevideo Convention on Rights and Duties of States, 1933 [165 *LNTS* 9; *USTS* 881; 4 *Malloy* 4807; 28 *AJIL*, *Supp.*, 75].

Protocol II on Prohibition or Restriction on the Use of Mines, Booby Traps and other Devices annexed to the Convention on Prohibitions or restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 3 May 1996 [1998 *ATS* 17; 35 *ILM* 1443; *Cm.* 3581].

Protocols Additional to the Geneva Conventions, 1949: *Protocol I (Protection of Victims of International Armed Conflict)*, 8 June 1977 [1125 *UNTS* 3].

Protocols Additional to the Geneva Conventions, 1949: *Protocol II (Protection of Victims of Non-International Armed Conflict)*, 8 June 1977 [1125 *UNTS* 609].

Regulations on Land Warfare annexed to the *Hague Convention for the Pacific Settlement of Disputes*, 1899 (revised 1907) [UKTS 9 (1910), Cd. 5030].

Security Treaty between Australia, New Zealand and the United States of America, 1 September, 1951 [*Aust. TS* 1952, No. 2; UNTS 131; TIAS 2493].

South Pacific Nuclear Free Zone Treaty, 1985 [24 ILM 1440 (1986)].

Statute of the International Atomic Energy Agency, 26 October 1956 [*Aust. TS* 1957, No. 11].

Stockholm Declaration on the Environment, 1972 [UN Doc. A/CONF. 48/14 7 Corr. 1 (1972)].

Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, 1963 [480 UNTS 43].

Treaty of Pelindaba, 11 April 1996 [UN Doc. A/RES/50/78 (1995)].

Treaty of Tlatelolco, 1967 [634 UNTS 281].

Treaty on the Limitation of Anti-Ballistic Missile Systems, 1972 [944 UNTS 13].

Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968 [7 ILM 809; 1973 *Aust. TS* No. 3].

Treaty on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction [1015 UNTS 163].

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 1971 [955 UNTS 115].

Treaty on the Reduction and Limitation of Strategic Arms, 1993 [16 UN Disarmament Yearbook (1991), App. II, p. 450].

United Nations Convention on the Law of the Sea, 1982 [A/Conf. 62/122; 21 ILM 1261].

United Nations Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, 24 November 1961 [Resolution 1653 (XVI)].

Vienna Convention on the Law of Treaties, 22 May 1969 [1155 UNTS 331].

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Introduction

Summary of the Study

On 6 August 1945, United States President Harry S. Truman announced the detonation of a new type of bomb over Hiroshima, Japan, which had yielded a blast-power more than one thousand times greater than that of its most destructive predecessor.¹ That event, together with the detonation of a similar bomb over Nagasaki three days later, resulted in combined civilian casualties of over 118,000 dead, with approximately 95,000 injured.² The survivors of these nuclear explosions, and many of their descendants, continue to suffer the medical and genetic effects of exposure to large doses of ionising radiation.

Despite the inhumanity of these devices, the international community of states did not immediately renounce nuclear weapons as an illegitimate means of waging war. Between 1945 and 1955, as the power of individual nuclear bombs grew by a factor of approximately one thousand, the global stock of weapons exceeded even that rate of growth. The result was that, by the mid nineteen fifties, the potential power of the world's nuclear weapons had multiplied more than one million times.³

Since the first nuclear decade, concern about the spread of nuclear weapons around the world has been an integral part of the international political and strategic landscape. Perceptions about the consequences of the threat or use of nuclear

¹ *Disarmament negotiations and treaties 1946-1971: Keesing's Research Report 7.* (1972). New York: Charles Scribner's Sons. At p.1. The force of the Hiroshima atomic bomb was estimated to be equivalent to the blast-power of ten thousand tons of conventional TNT high explosive. Campbell, C. (1984). *Nuclear facts: A guide to nuclear weapons systems and strategy.* Feltham: Hamlyn. At p.48. Other effects include heat and ionising radiation, experienced both immediately (from the explosion), and via the later atmospheric fallout of radioactive particles. The largest previous high-explosive aerial bomb, used by Britain against high-value targets in Germany during the Second World War, contained ten tons of high explosive.

² *Ibid.* (1972). At p. 36.

³ *Arms control: Readings from the Scientific American.* (1973). San Francisco: W. H. Freeman. At Preface.

weapons for global political stability, and ultimately for the survival of the human race, have been the enduring *leitmotif* of post-World War II international relations. The two nuclear explosions over Japan, together with the adoption in 1945 of the United Nations Charter,⁴ have combined, in seminally important ways, to shape the course of world history up to the present day.

The development of deliverable nuclear weapons permanently altered the nature of security relations between states. During the half-century which has now elapsed, states' perceptions both of the range of alternative sovereign actions available to them in their international relationships, and of the relevance and utility of international law on the use of force, have been modified in ways which reflect the unique characteristics of nuclear weapons.

It is possible to argue, in a general sense, that the regimes, institutions, regional groupings, and political, economic and military alliances which characterise international relations at the beginning of the third millennium owe more, in terms of their current morphology and potential to effect change, to the fear of nuclear weapons proliferation than to *any* other single factor.⁵

The possession by states of nuclear weapons (or a reliance on the nuclear protection of other states) will inevitably influence the international legal and political directions of the decision-makers of any state, and in ways which may not be capable of reliable prediction. The proliferation of nuclear weapons around the world carries with it, therefore, the threat of greatly magnified levels of political instability between nation-states, leading in some circumstances to possible confrontation or armed conflict.

When the strategic arms available in such circumstances include readily *deliverable* nuclear weapons, the urgent need for their control and eventual destruction must lie beyond reasonable doubt.

⁴ Signed at San Francisco on 26 June 1945. Entered into force on 24 October 1945. See Appendix 1.

⁵ A sense of the reach and depth of change alluded to here can be gained from a comparison of this discussion with that of Zolo, who (within the context of an imputed shift in the central precepts of democratic theory) argues that the level of complexity of modern political economies necessitates a paradigmatic change to notions of democratic representation which acknowledges the evolutionary risks of the growing "information revolution." encountered by those societies. Zolo, D. (1992). *Democracy and complexity: A realist approach*. Cambridge: Polity Press. At p. ix.

The history of nuclear arms control began shortly after the introduction in 1945 of nuclear weapons into the arsenal of the United States. Many early initiatives, such as the constitution of the United Nations Atomic Energy Commission,⁶ proved ineffective in the face of the deep and growing animus evident between the United States and the Soviet Union. Thus, *impasse* was compounded by unrealistic attempts to create enforcement regimes based on municipal legal models, and initiatives which sought from states greater abrogation of sovereignty than many were, at that point, willing to concede.⁷

Greater progress came with the constitution of the United Nations Disarmament Commission in 1952, and of the International Atomic Energy Agency at Vienna in 1957.⁸ Two years later, United Nations General Assembly Resolution 1380 (XIV) - the so-called "Irish Resolution" - marked the beginning of many years of initiatives at New York and Geneva which aimed at achieving an end to the multiplication and ever-expanding reach of nuclear weapons.⁹

The development of permanent arms control institutions continued in 1961 with the creation of the Eighteen Nation Disarmament Committee (ENDC), the predecessor of the present United Nations Conference on Disarmament (CD) at Geneva.¹⁰ The CD, though not a formal UN body, remains the only multilateral disarmament negotiating forum within the United Nations system.

It is the Conference on Disarmament, in its original form, which provided the forum for the negotiation of the 1968 *Nuclear Non-Proliferation Treaty*. This

⁶ The United Nations Atomic Energy Commission was created by Resolution 1 (I) of the United Nations General Assembly on 24 January 1946, and was dissolved by the Assembly on 11 January 1952, having achieved none of its objectives after two years of stalemate. Dahlitz, J. (1983). *Nuclear arms controls with effective international agreements*. Melbourne: McPhee Gribble. At p.11.

⁷ *Ibid.* At pp. 11, 12.

⁸ *Ibid.* At pp. 13, 14.

⁹ The resolution called for a study by the short-lived Ten Nation Disarmament Committee (a forerunner of the Eighteen Nation Disarmament Committee at Geneva) into the feasibility of an international agreement in which nuclear weapon states agreed not to transfer nuclear weapons to other Powers, and non-nuclear weapon states agreed not manufacture them. Federation of American Scientists. (2001). *Nuclear Non-Proliferation Treaty [NPT] chronology* [on-line]. Available WWW: <http://www.fas.org/nuke/control/npt/chron.htm>.

¹⁰ *Loc cit.* At Note 8.

Treaty still represents the high point in international co-operation aimed at controlling the spread of nuclear weapons, 187 member states of the United Nations having acceded to its terms by early 2000.¹¹ In the continuing absence of a Nuclear Weapons Convention completely prohibiting nuclear weapons, the NPT remains the most widely accepted and durable instrument limiting their scope.

Through the United Nations Organisation, Australia (whose Permanent Mission was the first to be accredited to the UN at New York) has a long record of involvement in multilateral arms control negotiations.¹²

Recent Australian participation in international arms control efforts reached its zenith at the 1995 *Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons* (NPTREC), held at New York from 17 April to 12 May 1995. The Australian Delegation to the Conference (which extended, indefinitely, the operation of the NPT) has reported Australia's "active role in all negotiating subsidiary bodies" established by the Conference, while the *Principles and Objectives for Nuclear Non-Proliferation and Disarmament* adopted by the Conference incorporated "many Australian ideas and Australian language."¹³

Australia's contribution to the 1995 Conference underlines its long-term participation in many aspects of international nuclear arms control efforts. Two other important contributions, from many, have been this country's work in negotiations leading to the 1985 *Treaty of Rarotonga* (also known as the *South Pacific Nuclear Free Zone Treaty*),¹⁴ and the prospective *Comprehensive Test Ban Treaty* (CTBT), opened for signature on 24 September 1996, but not yet in force.¹⁵

¹¹79 UNTS 161; 21 UST 483; TIAS 6839. Hereafter usually termed "NPT."

¹²All aspects of Australia's participation in multilateral arms control negotiations must be understood in the context of this country's obligations as a minor member of the Western defence alliance, and particularly in terms of the rights and obligations created by the *ANZUS Treaty* with the United States and New Zealand. ATS 1952 No. 2; UNTS 131 p. 38; NZTS 1952 No. 7; TIAS 2493.

¹³*Report of the Australian delegation to the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation Treaty, New York, 17 April to 12 May 1995.* (1995). Canberra: Department of Foreign Affairs and Trade. At paragraphs 9, 17, and p. 62. The language of the Report cited here should be viewed within the context of the non-proliferation objectives of its corporate author.

¹⁴24 ILM 1440; NZTS 1986, No. 7. Signed 6 August 1985; Instrument of Ratification deposited 11 December 1986. The text of the Treaty is reproduced in: *The United Nations and nuclear*

More generally, Australia remains an active member of the Conference on Disarmament (CD) referred to above, and of the United Nations Disarmament Commission.¹⁶

At the same time, it should be noted, as Wilson has pointed out, that Australia exhibits an ambivalent attitude towards nuclear energy. With around 30 per cent of the world's economically extractable uranium reserves, and with no domestic requirement for nuclear energy in electrical power production, uranium exports are "reluctantly condoned ... under strict [International Atomic Energy Agency] safeguards."¹⁷

The strong and consistent commitment by Australian Governments since 1973 to nuclear non-proliferation principles (notwithstanding continuing uranium exports) contrasts with the equivocal attitude of their predecessors, during the nineteen fifties and sixties, to nuclear policy development generally, and in particular to the question whether Australia should acquire an independent nuclear deterrent force.

non-proliferation: Blue Book Series (Vol. III). (1995). New York: United Nations Department of Public Information. At p. 138 *et seq.* CD633 and Corr. 1. *Australian Treaty List: Multilateral Treaty List* [on-line]. Available WWW: http://www.austlii.edu.au/au/other/dfat/treaty_list/multilist/1985.html

¹⁵Arms Control and Disarmament Agency (1998a). *United States Arms Control and Disarmament Agency: Comprehensive Test Ban Treaty chronology during the Clinton Administration* [on-line]. Available www: <http://www.acda.gov/ctbtpage/ctbchron.htm>. Having signed the treaty on 24 September 1996, Australia was the fifteenth state to ratify the CTBT, on 9 July 1998. It was also seventh on the list of 44 nuclear-capable states whose ratification is required in order to bring the CTBT into force. Department of Foreign Affairs and Trade (1999). *Australia and the United Nations: areas of particular Australian interest and contribution* [on-line]. Available WWW: http://www.dfat.gov.au/un/aus_un5.html. Australia signed the Treaty of Rarotonga on 6 August 1985, and deposited its instrument of ratification on 11 December 1986.

¹⁶Australian Parliamentary Joint Committee on Foreign Affairs and Defence. (1986). *Disarmament and arms control in the nuclear age*. Canberra: AGPS. At Chapter 9, paragraphs 29 - 33. The United Nations Disarmament Commission, which was originally established in 1952, and reconstituted in 1978 by the First United Nations General Assembly Special Session on Disarmament, considers and makes recommendations on disarmament issues pursuant to General Assembly Resolutions and recommendations. It is responsible directly to the UN General Assembly and Security Council, unlike the many UN Specialised Agencies (such as the World Health Organisation, and the Food and Agriculture Organisation) which report to the General Assembly through the Economic and Social Council.

¹⁷Wilson, M. (1995). *The nuclear future: Asia and Australia and the 1995 Conference on Non-Proliferation: Australia: Asia Papers, No. 74*. Brisbane: Griffiths University, Centre for the Study of Australia-Asia Relations. Chapter. III: "Australian interests, policies and future directions", p.37 *et seq.*

A study recently published in Australia by Dr. Wayne Reynolds surveys what was, he concludes, an on-going attempt by successive Australian governments, from Curtin to Gorton, to acquire nuclear weapons. Reynolds asserts that Australia's quest was assisted by its participation in Britain's own nuclear weapons programme until 1957, and thereafter continued independently, although under a US nuclear umbrella.¹⁸

Policy ambivalence has also been evident in Australia's approach to nuclear policy development in regard to the mining and processing of natural uranium ores, and the large-scale generation of electrical energy using nuclear technology.

From an organisational or bureaucratic perspective, one explanation for the imputable lack of early nuclear policy coherence may stem from the absence of any centralised control and co-ordination function exercised by a single government instrumentality. Instead, independent factors (such as the predominance of influential individuals and entrenched institutional bias) tended to produce uncoordinated reactions across a range of interested agents, each with its own agenda.¹⁹

It is a central assertion of this study that Australia, as an active member of the international community, is able with confidence and legitimacy to exercise its international legal personality in order to effect change and development in the law which it accepts, and which it seeks to strengthen.²⁰

¹⁸ Reynolds, W. (2000). *Australia's bid for the atomic bomb*. Carlton: Melbourne University Press. See especially Chapter 9: The End of Empire Defence.

For a second, less discursive, article-length examination of Australia's search for nuclear weapons, see: Hymans, J. E. C. (2000). Isotopes and identity: Australia and the nuclear weapons option, 1949 - 1999. *The Nonproliferation Review*, (Spring 2000), 1 - 23.

¹⁹ Carr, M. (1979). *Australia and the nuclear question. A survey of government attitudes 1945 to 1975*. Unpublished master's thesis, University of New South Wales, Sydney. At p. vii.

²⁰ Australia's status as a state with international personality is established generally by the terms of Article 1 of the 1933 *Montevideo Convention on Rights and Duties of States*. 165 *LNTS* 9; *USTS* 881; 4 *Malloy* 4807; 28 *AJIL*, *Supp.*, 75 (1934). Article 1 stipulates that a state should have: (a) a permanent population; (b) a defined territory; (c) government and (d) a capacity to enter into relations with other states. Here, the final qualification is significant, in that the "capacity to enter into relations with other states" refers to independence as understood in the Separate Opinion of Judge Anzilotti in the *Austro-German Customs Union Case*: Advisory Opinion, *P.C.I.J. Reports, Series A/B, No. 41* (1931). Independence is there understood as independence in law from the authority of any other state, which in turn provides the capacity in law to conduct relations with any other state. Harris, D. J. (1991) *Cases and materials on international law* (3rd rev. ed.). London: Sweet & Maxwell. At pp. 102-107.

It follows that Australia will, *ceteris paribus*, use its legal personality to effect changes in international law which it believes to be beneficial, in a general sense, to the society of states - and thus to be in its national interest to pursue. Alternatively, it will endeavour to achieve legal developments which it believes are in its own national interest, and will attempt to convince other states of their wider utility.²¹

One articulation of these maxims, made at the time of the negotiations leading to the NPT, was contained in the Ministerial Statement to the House of Representatives by the Minister for External Affairs, (then Mr.) Paul Hasluck, on 26 March 1968. In that Statement he said:

We are conscious of the great world issues of power and their interaction with issues of regional security. We recognise the special responsibilities of the great powers, as the [C]harter of the United Nations does, *but we also insist on a proper role being accorded to the middle and small powers, which for their part have responsibilities to discharge and rights to be protected.* Australia plays its part in collective defence against aggression (emphasis added).²²

Australia uses a range of bilateral and multilateral negotiating fora, both within and outside the United Nations institutional system, to pursue and protect its own interests, and those of the global society of states. As it does so, it acknowledges the sovereignty, territorial integrity, and political independence of its fellow community members. Thus, the extent to which Australia's own interests in nuclear non-proliferation coincided with, or appeared to be in conflict with, those of other states (not least the United States) during international negotiation of the NPT, forms a fundamental component of this study.

²¹Senator Gareth Evans, former Australian Minister for Foreign Affairs and Trade, has alluded to the issues involved in the political corollary of these questions thus:

.... we do not pause as often as we should to scrutinize just how, from our perspective, the world is changing; nor do we consider, as often or as carefully as we should, how our foreign policy might seek not only to react to, but to influence, those changes.

Evans, G. (1989b). Australian foreign policy: Priorities in a changing world: The Roy Milne Lecture; 1989. *Backgrounder*, 654, A1-A28. At A1. It is noted here that the legal and political aspects of all kinds of international rules affecting states will be acknowledged in the study through its explicitly interdisciplinary focus.

²²*Commonwealth Parliamentary Debates, Hansard House of Representatives* 58, 26 March 1968. Canberra: Commonwealth Government Parliamentary Office. At p. 446.

Australia's geography and security alliances have dictated for it a role which, to some extent, lies on the periphery of world events. As a stable, liberal, constitutional democracy, and as a long-standing Western ally of the United States on the Pacific Rim, Australia has, despite its relatively modest economic and military potential, often regarded itself as sufficiently important to influence events within its own region.

Conversely, at the global level, Australia has often seen itself as small enough economically, politically and diplomatically to be able, to some extent, to run its own race. At the same time, it has been regarded by other states as sufficiently significant, geo-politically and economically, to matter in the councils of the northern democracies.²³

The confluence of these trends gives Australia the potential to enhance, in a co-ordinated way, its reputation as a good "world citizen", concerned to enhance global prospects for peace and disarmament.

Framed in this context, Australia's part in the story of UN and Western efforts to halt the spread of nuclear weapons can be understood from three distinct perspectives: its defence and security alliance with the United States, its regional and wider status in the international community, and its own reluctance permanently to renounce the option of acquiring an independent nuclear deterrent.

The convergence of Australia's interests in these aspects of its national and international life was the vehicle through which, as the study will assert, it came to exert substantial influence over a United States Government which was anxious to engineer a credible multilateral nuclear non-proliferation treaty before the genie of nuclear proliferation had finally escaped.

While Australia continued to rely on the protections which the ANZUS treaty provided, it harboured a politically significant group of politicians, bureaucrats, senior defence personnel and nuclear scientists who were anxious that Australia should not bow to the wishes of the United States on halting nuclear

²³Makinda, S. M. (1996/97) Why "good citizen" Australia lost the global power play. *Current Affairs Bulletin*, 73 (4), pp. 22 - 26. This article examines Australia's unsuccessful campaign in October 1996 for a two-year seat at the United Nations Security Council, arguing that short-term inconsistency in foreign policy development by Australia (in relation to East Timor and the Middle East) was instrumental in excluding success. The article nevertheless addresses Australia's aspirations to global significance, especially in the councils of the United Nations. At pp. 22, 23.

proliferation. The structure and agenda of this so-called “bomb lobby” coalition will form an important part of the argument of the study in regard to the process by which Australia developed its final nuclear policy position as a response to the negotiation of the NPT.

As the United States sought Australia’s clear support for the NPT during early 1968, the “bomb lobby” coalition stiffened its resistance against a proposal which it saw as unnecessary, a threat to Australia’s sovereignty and national interests, and (above all) avoidable.

Statement of Purpose

Until recently, attempts to interpret and analyse the actions of the Gorton Liberal/Country Party Coalition Government towards national nuclear policy development have been hampered by the 30 year embargo on release of archived federal government documents. Since January 1998, however, the majority of the most important primary material covering the evolution of nuclear policy planning and development within the central federal bureaucracy and its agencies has been accessible from the Australian National Archives.

Now, clear evidence exists in the public domain of the course of events surrounding the Gorton Government’s attempts, especially during the first half of 1968, to deal with the conflicting needs of a confused and inconsistent domestic nuclear policy position, and an insistent United States Government seeking Australia’s urgent and unequivocal support for the NPT.

In this context, it is clear that Prime Minister Gorton himself did not view Australia’s renunciation of nuclear weaponry, and its support of the new treaty, as inevitable. Speaking on 1 January 1999, as archived material for the 1969 calendar year was released by the Australian National Archives, he alluded briefly to his own interest in the potential of nuclear technology in Australia as a guarantee of both energy and national defence:

We were interested in [nuclear technology] because it could provide electricity to everybody and it could, if you decided later on, it could make an atomic bomb.²⁴

Given the dearth of primary evidence in the public domain, it is not surprising that the earlier works of scholars attempting to explain and interpret the development of Australia's nuclear policies during this period were unable, for example, to discern the significant level of influence exerted by Australia on its American ally over the interpretations to be placed by the US on the terms of the NPT. Indeed, the only directly relevant contemporaneous reference to Australia's negotiating position during early 1968 appears to be a passing reference in the Government's own compendium of current international affairs, *Current Notes on International Affairs*.²⁵

Nor is it surprising that the broader work of scholars on the international negotiation and implementation of the NPT has nothing to say about the part played by Australia's resistance against those components of the treaty which, it claimed, threatened its sovereignty and national interests. For example, the most comprehensive work on the negotiation and implementation of the NPT, Shaker's exhaustive three-volume study of 1980,²⁶ is silent on Australia's role, while earlier and later general works, such as Epstein's monograph on the NPT negotiations between 1958 and 1968,²⁷ are similarly devoid of reference to the importance of Australia's views to US negotiators.

While the recent release of archived government documents has begun to stimulate new interest in Australia's nuclear history, none of the studies so far completed has focused on the conundrum of Australia's influence over the United States through its resistance against the US over unacceptable elements of the NPT.

²⁴Clark, P. (1999, January 1). Sir John very much alive and unfazed. *The Sydney Morning Herald*, pp. 1, 6. At p.6.

²⁵Treaty on the Non-Proliferation of Nuclear Weapons. (1968, June). *Current Notes on International Affairs* 39, 234-240.

²⁶Shaker, M. I. (1980). *The Nuclear Non-proliferation Treaty: Origin and implementation 1959-1979* (Vols. I, II, & III). London: Oceana.

²⁷Epstein, W. (1976). *The last chance: Nuclear proliferation and arms control*. New York: The Free Press. At Chapter 5.

The significance of this omission is clear from the fact that the treaty remains the most important single component of the regime of global nuclear arms control.

Recent works by Hymans,²⁸ Walsh²⁹ and Reynolds³⁰ are concerned primarily with only one side of the Australian nuclear policy equation: the question whether to acquire nationally-controlled nuclear weapons. They leave largely unresolved the issues inherent in the reciprocal alternative position: a decision *not* to acquire them, combined with adherence to the 1968 *Nuclear Non-Proliferation Treaty*.

Since the latter decision was eventually made, and formed the basis for Australia's close involvement in global nuclear affairs over many years, it is clearly important to understand the process by which Australia was transformed from a nuclear sceptic into a strong campaigner against global nuclear proliferation.

The purpose of this study is, therefore, to analyse the data newly available to scholars on the role played by Australia in the genesis and early evolution of the 1968 *Nuclear Non-Proliferation Treaty*, in order to gain insights into this country's involvement as a middle-ranking, though influential, state in multilateral arms control treaty negotiations, and particularly in bilateral arms control negotiations with the United States.³¹

The study is interdisciplinary in nature. It uses an analytical strategy which recognises that both public international law *and* the theoretical foundations of international relations scholarship can contribute to enhanced understanding of global policies for effective nuclear arms control.³²

²⁸Hymans, J. E. C. (2000). Isotopes and identity: Australia and the nuclear weapons option, 1949-1999. *The Nonproliferation Review* (Spring, 2000), 1 - 23.

²⁹Walsh, J. (1997). Surprise down under: The secret history of Australia's nuclear ambitions. *The Nonproliferation Review* [on-line]. Available WWW: <http://cns.miiis.edu/pubs/npr/walsh51.htm>

³⁰ *Op. cit.* At Note 18.

³¹Those records containing relevant data, which are held by the Australian National Archives, are released annually for general scrutiny following the expiration of thirty years from the date of their creation. Thus, those relating to the final negotiations (during 1968, and involving Australia) which led to the signing of the NPT were released from embargo on 1 January 1999. Most archival material used in the study originated in the Department of External Affairs and the Australian Atomic Energy Commission. Exhaustive searches at the Australian National Archives have failed to reveal any relevant material directly attributable to the Department of Defence, its agencies, or the Australian Defence Force.

³²The interdisciplinary context of the study is discussed in greater detail below.

Using the archival material noted above, the analysis will enable new conclusions to be drawn about Australian sources of legal and political influence modulating the development of international law on the use of force by states, and in particular international law relevant to nuclear proliferation. It will also allow conclusions to be drawn about the ability of Australia, and similar middle-ranking states, to influence the negotiating position of more powerful allied states on questions of global significance by exercising firm resistance based on national interests.

Both sets of conclusions have significance as models for the development of bilateral and multilateral nuclear arms control relations between states, and for the development of legitimate mechanisms for the evolution of the international law of arms control and disarmament. By arguing that states of moderate size and strength can demonstrate important influence (in the arena of arms control) over far stronger states, and over the course of international legal development, the study will show that it is open for such states to take a more active role in the negotiation of multilateral agreements aimed at controlling armaments of all kinds.

Structure of the Study

The study comprises an Introduction and seven Chapters which trace the course of Australia's journey from nuclear ambivalence, based on an uncoordinated and incoherent national nuclear policy position, towards strong and unequivocal support for the principles of nuclear non-proliferation.

Together with an examination of the purpose, structure and methodology of the study, and a review of relevant literature, the Introduction provides an overview of the inter-disciplinary nature of the thesis. It considers the alternative theoretical frameworks provided by international relations theory and international law, while noting the deficiencies inherent in each. It goes on to detail the advantages and significance of a theoretical foundation for the study which combines these two apparently mutually exclusive disciplinary frameworks, presenting them as

complementary perspectives on the same problem - the threat or use of force by states in the United Nations era.

Chapter One then introduces the 1968 *Nuclear Non-Proliferation Treaty*,³³ the negotiation of which is the focus of the study's analysis of Australia's role in the development of a global regime prohibiting the spread of nuclear weapons. It addresses the treaty's structure, aims, potential effectiveness, deficiencies, and ability - as conventional international law - to influence the evolution of other nuclear disarmament agreements.

On the latter point, the chapter traces the development of the nuclear non-proliferation "regime" of bilateral and multilateral understandings, accepted practices, agreements, treaties and institutions which support and reinforce the legitimacy and durability of this most fundamental of global bargains.

Chapter Two turns to Australia's contribution to the global nuclear non-proliferation debate as progress towards the conclusion of NPT negotiations accelerated during the early months of 1968. First, it establishes the broad context of the national nuclear policy development process through an examination of the factional struggle within and outside government for policy dominance. In doing so, it surveys a range of domestic and external factors (such as the feasibility of building large-scale nuclear power generating stations, and the strength of Australia's security alliance with America) which generated and sustained the nuclear policy debate.

Second, it reviews the range of responses to the new treaty which were available to Australia. It does so through analysis of the record of dialogue which developed between the Australian and United States Governments over acceptable interpretations of a range of issues raised both by the black-letter terms of the NPT, and by their application and operation.

Chapter Three further develops the theme of Australia's search for policy coherence by examining closely the interests, agendas, biases and global perspectives of the two predominant representatives on each side of the debate. Thus, the non-proliferation advocacy of senior officers within the Commonwealth Department of External Affairs (DEA) is contrasted with the opposing institutional

³³The treaty will be referred to, throughout the study, as either the "Nuclear Non-Proliferation Treaty" or using the abbreviation "NPT".

views of the Australian Atomic Energy Commission (AAEC), led by its Chairman, Sir Philip Baxter. The policy position of the Department of External Affairs, developed through its dialogue with US counterparts on the status of multilateral NPT negotiations at Geneva, is presented as a key element in the eventual success of Australia's non-proliferation advocates.

Chapter Four examines the processes by which Australia's confused nuclear policy position was resolved in light of the urgent need to present a clear and sustainable national position on nuclear proliferation to its major ally, the United States, as well as to the Western Alliance, and at the United Nations General Assembly.

A centrally important theme in this context is the process by which Australia, in attempting to synthesise a politically sustainable nuclear policy position, was able to exercise disproportionate influence over the United States on the interpretation of the terms of the NPT. By comparing the aims and concerns of Australia's consolidated nuclear policy with the final position of the United States on NPT interpretation, the chapter demonstrates the degree to which Australia, in pursuing its own national interests, impelled America to concede ground over the interpretation and operation of the treaty.

Chapter Five turns to the arena of the United Nations General Assembly in its review and analysis of the final stages of the negotiation and institution of the 1968 *Nuclear Non-Proliferation Treaty* - its endorsement in the principal forum of the UN. The chapter argues that the limits of Australia's ability, as a middle power, to influence outcomes in multilateral arms control agreements was reached as the United States drew a line under its efforts to accommodate Australia's concerns, and thus bring its oldest Pacific ally into line with its own nuclear non-proliferation policy.

The NPT would become a reality, with or without Australia's participation. The chapter argues, nevertheless, that despite its early failure to sign and ratify the treaty, Australia had been influential over the ways in which both nuclear and near-nuclear states approached the question of their own adherence to it.

Chapter Six continues to look beyond Australia's relationship with the United States by examining more closely evidence of the extent to which other states were guided or influenced in their own decisions on the NPT by Australia's

actions, both indirectly (through the US) and in bilateral diplomacy. It concludes that, as far as its bilateral relations on the NPT were concerned, there is little strong evidence to show that Australia contributed in decisive ways to the actions of those states with which it held discussions on matters of mutual interest. Nevertheless, those discussions formed a starting point for Australia's growing activism in support of global anti-proliferation efforts, a policy direction which it has sustained into the new century.

Finally, Chapter Seven presents the central conclusions of the study. The most important conclusion is that Australia demonstrated, in the process of its transformation from ambivalent nuclear sceptic to anti-nuclear weapon activist, that a middle-ranking power could claim a place as an influential agent in the evolution of the most vital component of the international law of arms control - the 1968 *Nuclear Non-Proliferation Treaty*.

Theoretical Foundations of the Study

The study is grounded on two fundamental and complementary theoretical bases. First, from an historiographical perspective, it builds a coherent analysis of documentary evidence through its acknowledgment that, at least in the sphere of nuclear policy development in Australia, decisions and actions have been primarily the result of a synthesis of the agency of institutions of government, and of individuals within them. The convergence of the legal and political elements of governance in such an important area of national policy, in which both information and decision-making powers were tightly controlled by a small number of senior bureaucrats and government ministers, demands that this foreshortened view of history should prevail.

Thus, the study takes on the character of history constructed from above, in which legitimate government *fiat* was unchallenged in its creation of universally acknowledged outcomes and realities. Indeed, Australia's interest in the implications of the NPT was barely acknowledged in popular or political debate. Although alternatives to a governmental/bureaucratic nuclear historiography exist

(such as one based on the role of broad social movements and special interest groups) the evidence presented in this study is not capable of testing their legitimacy.

The second conceptual foundation for the theoretical structure supporting this study is an interdisciplinary synthesis of international law on the threat or use of force, and the work of post-World War II international relations theorists.³⁴ Neither discipline alone can adequately account for, nor elaborate, the range of observed behaviour in relations between states in the international system. Thus, the decisions and actions of Australia in respect of the processes of negotiation of the NPT, and later, cannot be fully explained merely in terms of the institution of international law, important as it undoubtedly was in those processes.³⁵

Similarly, Australia's response to initiatives based on a globally perceived need for mechanisms aimed at slowing or halting the spread of nuclear weapons cannot be fully understood solely from any realist political perspective which discounts international law structures and principles, or banishes them from the field on grounds of irrelevance.³⁶ In fact, both perspectives informed the processes of

³⁴Slaughter, A-M., Tulumello, A. S., & Wood, S. (1998). International law and international relations theory: A new generation of scholarship. 92 *AJIL* 367, at 367-369, 384. Slaughter-Burley, A. (1993). International law and international relations: A dual agenda. 87 *AJIL* 205, at 205-213. These authors provide a comprehensive chronology and evaluation of the evolution of international relations theory, and its intellectual estrangement in the twentieth century from international law theory and praxis. These articles cover the period from the idealism of the early years following World War I to the current enthusiasm for creating a joint discipline and research agenda based on the convergence of its constituent disciplines around the "basic proposition: that actors, identities, interests and social structures are culturally and historically contingent products of interaction on the basis of shared norms." At 384.

³⁵The NPT is, of course, an international treaty instrument which legally binds its adherents under the terms of the 1969 *Vienna Convention on the Law of Treaties* [1155 *U.N.T.S.* 331]. The latter may be regarded as constitutive of the customary law on treaties, and thereby attracts the status of *jus cogens*. Thus, Australia had carefully to take into account its *legal* obligations under the NPT, should it decide to accede to its terms.

³⁶The crude realism of Hans J. Morgenthau (which continues to attract adherents - cf. Mearsheimer, J. J. (1990). Back to the future: Instability in Europe after the Cold War. *International Security*, 15 (1), 5 - 56) was challenged in 1959 by Kenneth Waltz in his work *Man, the state and war*. There, Waltz developed a critique of realism which pointed out its failure to take account of systemic explanations of state behaviour which rely on "structure," as distinct from a system which was nothing more than the sum of motives and actions of the actors within it. *Supra*. Note 34, (1993), at 217.

More specifically, Waltz used a trichotomy to illustrate his argument: His "first-image" explanation of international outcomes focuses on human nature itself, his "second-image" on the internal structures of the state, and his "third-image" on the international structural environment. Powell, R. (1994). Anarchy in international relations theory: The neorealist-neoliberal debate. *International Organization*, 48 (2), 313 - 344. At 315.

Waltz' Structural Realism stands in sharp contrast to the various legal responses to realism, many of

decision and action in this instance, as they do in most cases in which states weigh preferences, and take actions which have consequences beyond their national borders.³⁷

What, then, are the important components of the international system of states within which Australia operated in 1968, and how have those components evolved since that time? First, it must be acknowledged unequivocally that international law continues to count within the international relations of states. Specifically, international law matters to states themselves, and to the national, international and supranational organisations and institutions (and the individuals within them) which work across national boundaries.

States demonstrate that this is so by attending to the law's customs and conventions, and to its principles and structures, thereby acknowledging their legitimacy and abiding by the constraints which international law imposes on their preferences and actions. So much is readily evident from the range and complexity of bilateral and multilateral treaties and other instruments which, as they have grown exponentially since 1945 (and increasingly since the 1970s) have characterised the international legal landscape.³⁸

Franck has suggested that it is legitimacy *itself* which is capable of explaining states' adherence to international law rules, an effect which is often postulated in respect of obedience to rules in domestic law systems.³⁹ More which sought to reconfigure international law, and its relationship with international politics, in order to define a link between legal doctrines and policy choices. *Supra*. At Note 14, p. 209.

³⁷This statement of fundamental principle is not intended to take into account the responsibilities of states in respect of the wide range of international human rights and environmental law, and of the humanitarian laws of war, which are often seized by events and consequences wholly within the boundaries of a state.

³⁸An indication of the extent of this corpus of public international law may be gained from the fact that Australia, an active middle-power participant in international affairs, has now acceded to approximately one thousand international treaty instruments, the majority of which post-date 1945. *Australia: Department of Defence: Australian Treaty Series*. (1974). Canberra: A.G.P.S.

The range of public international law now goes far beyond traditional concerns with inter-state immunity, comity and non-intervention. Its arena has grown to encompass such areas as the conservation of biosphere resources, atmospheric change, commerce and communications.

³⁹His definition of legitimacy is:

.... a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed

specifically, he contends that “[the] indicators of rule-legitimacy in the community of states are: determinacy, symbolic validation, coherence and adherence”, and that the degree of the presence of these factors will determine the extent to which a state will avoid or ignore the rule, and its maker, in pursuit of its short-term self-interest.⁴⁰ Thus, a rule will be followed by agents who clearly perceive its meaning, acknowledge its authenticity, accept it as comprehensible within the rule-system it inhabits, and believe that it will be adhered to by those others who perceive themselves to be obligated by it.

Franck goes on to identify the categories of “the legitimacy factor” variously in terms of a Weberian process of legitimation, of a procedural-substantive perspective on the legitimacy of rules, and of a definition based on outcomes, defensible in terms of equality, fairness, justice and freedom.⁴¹

Other philosophers of law have also addressed the question of the sufficiency of coercive power in compliance with rules, and it is perhaps not coincidental that many identify circumstances and characteristics beyond the threat or use of force. Recurrent themes in their work are notions of justice, fairness, consistency and integrity, which they see as necessary for the evolution of legitimacy.⁴²

It is clear, then, that rules which are defensible in terms of legitimate procedures, processes or outcomes, within any society, are equally able, as Franck contends, to create a system of habitually obeyed law.⁴³ The nature of relationships in which rules are validated will vary widely among the vast range of possible interactions between the many structures of a community (such as components of its legal, constitutional, governmental and social identities). Thus “legitimacy theory

believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.

Franck, T. M. (1990). *The power of legitimacy among nations*. New York: O.U.P. At p. 24.

⁴⁰ *Ibid.* At p. 49.

⁴¹ *Ibid.* At pp. 17, 18. Cf. Hart, H. L. A. (1994). *The concept of law* (rev. ed.). Oxford: Oxford University Press.

⁴² Prominent among them is Ronald Dworkin, who has developed a theory of *coherence* as an explanation for the compelling nature of rules. Dworkin, R. (1986). *Law's empire*. Cambridge, MA.: Belknap Press. At pp. 176-244.

⁴³ *Supra.* At Note 39.

has many mansions",⁴⁴ both within the municipal law of states, and the international law which those states obey.

This brief discussion helps to support the hypothesis that there is a range of social and psychological explanations of observed compliance behaviour of states with the strictures of international law. Whatever compels their compliance, states continue to demonstrate the importance which they attach to the law, and their willingness, most of the time, to obey it. The degree to which states actually comply with international law is a matter of fact, to be established empirically through available evidence. The procedural and substantive reasons which impel their compliance is a matter of analysis of that evidence.

The second major component of the international system is an identifiable structure or matrix, comprising institutions, regimes, organisations, understandings and agreements of many kinds, which facilitates and enriches the system of relations between states. These structures may be formal or informal, constituted by governments or by other agents, and may operate within states themselves or at a trans-national or supranational level.

Nevertheless, the fact that individual nation-states continue to be the primary focus for their own analysis of evolution and change within that system, notwithstanding the growing importance of institutions in the inter-state arena, ensures that states will continue to be of fundamental importance to it.⁴⁵ As the ultimate focus of the action of most agents in the international arena, including those whose aim is towards outcomes which transcend the state, nation-states continue to occupy the primary position in any analysis of international relationships.

It is generally acknowledged, by both international lawyers and theorists of international relations, that the range and scope of international institutional

⁴⁴*Ibid.* At p.19.

⁴⁵As will become apparent below, the study acknowledges the necessity to include in this account of international structures and relationships the growing importance and influence of all kinds of organisations and institutions, which may or may not lie within the province and purview of the nation-states. Such entities range from the United Nations Organisation itself to the vast number of operationally-specific multilateral and bilateral governmental and non-governmental bodies of many types and sizes.

structures has grown at an exponential rate since the end of the Second World War, and that formal institutions continue to proliferate as global inter-connection evolves.⁴⁶

A more contestable claim is made by those international relations theorists who perceive a range of *informal* regimes, agreements and understandings which either underpin formal agreements such as treaties and protocols, or stand alone as the best available compromise position when formal agreements prove impossible.⁴⁷ Nevertheless, regardless of what characterises international institutions, their presence as vitally important conduits, moderators and legitimators of action, and as repositories of information, standards, and compliance strategies for states is now beyond dispute.

The third attribute of the international system which this study acknowledges as fundamentally important to its analysis (and one which was evident in 1968) is the growing speed, complexity, scope and density of inter-state connectivity, communications and relationships in both the governmental and non-governmental arenas. There can be little doubt that the development of communications media and transportation technologies of all kinds has altered the functional aspects of relations between states in several significant respects.

⁴⁶The international lawyer Kenneth W. Abbott, and the political scientist Duncan Snidal have addressed the question why states use *formal* international organisations by investigating their properties, and the functions they perform. They refer to examples of international organisations which are small (the secretariat of the Asia Pacific Economic Cooperation organisation), large (the European Union), specialised (the World Health Organisation) and innovative (the International Tribunal for the Former Yugoslavia). They assert that states use international organisations “to create social orderings appropriate to their pursuit of shared goals: producing collective goods, collaborating in prisoner’s dilemma settings, solving coordination problems”. They agree with Schermers and Blokker that: “‘It is impossible to imagine contemporary international life’ without formal international organisations.” Abbott, K. W., & Snidal, D. (1998). Why states act through formal organizations. *The Journal of Conflict Resolution*, 42 (1), 3-32.

⁴⁷A seminal work on informal issue regimes is Keohane’s 1984 analysis *After Hegemony*, which describes a functional analysis of regimes which enlists states’ rational egoism as the reason for their success. Since they reduce the “transaction costs” of decisions consistent with the regime’s principles, enhance order and legitimacy, foster linkage among issue areas, and improve the quality of available information, states are willing to accept their utility. Other advantages, according to Keohane, include reduced incentives to cheat, enhanced reputations for states, “benchmarked” standards of behaviour, and monitoring of compliance with promised action. Slaughter-Burley, A. (1993). International law and international relations theory: A dual agenda. 87 *A.J.I.L.* 205-239. At 218, 219.

First, it has engendered a rapid increase in the rate of change within all trans-national issue areas, or activities.⁴⁸ The rate at which financial, political, social, economic and strategic functions, transactions and ideas are now disseminated across state boundaries dictates that the time available between action and reaction, as data are gathered, assimilated, prepared and analysed, is correspondingly reduced.⁴⁹

This means, in turn, that the time available for response to emergent crises is far shorter than in any previous era (and certainly so when compared to thirty years ago). As a result, the processes of decision making must be modified accordingly.⁵⁰ Thus, the ability of states to react with certainty to rapidly changing circumstances will be increasingly dependent on their success in modifying the processes by which they take timely decisions and actions which have consequences beyond their borders.

In these circumstances, the notion of the unitary and undifferentiated state, which is a fundamental precept of the Law of Nations, must increasingly be modified in favour of the explicit recognition of non-state actors in the international sphere. Agents such as individual and aggregated knowledge specialists who act across state boundaries, regional and sub-regional cross-boundary interest groups, and nationally and trans-nationally constituted organisations all weaken the sovereignty of states, and their ability to take effective decisions and actions.⁵¹

⁴⁸The speed with which some economies in East Asia collapsed during the late 1990s was both unexpected, and in excess of most projected economic threat scenarios offered by global economists. *Press conference of Michael Mussa, Economic Counsellor and Director, Research Department, International Monetary Fund, Washington, D.C., 30 September 1998* [on-line]. Available WWW: <http://www.imf.org/external/np/tr/1998/TR980930.HTM>. At p. 1.

⁴⁹*Infra*.

⁵⁰Hubbard, C. (1999). *Nuclear proliferation: Does the past inform the future?* Unpublished manuscript. Edith Cowan University, Perth, Western Australia.

⁵¹*Ibid*.

It is appropriate here to acknowledge that, within the modern international system, no state can claim level of sovereignty enjoyed by polities (especially in Europe) until the century leading up to the *Peace of Westphalia* of 1648, which laid down in treaty and customary law form the modern Western system of sovereign nation states.

Slaughter has claimed that:

The state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts - courts, regulatory agencies, executives and even legislatures - are networking with their counterparts abroad, creating a dense web of relations that constitute a new,

The final meta-theoretical aspect of this study, which must be elaborated in order to explain its analytical strategy, is the concept of liberalism within international theory. At its most fundamental conceptual level, international liberalism is concerned with trans-national relations between individuals, and between individuals and the state.⁵² The extent to which a state can be regarded as “liberal” will be determined by the degree to which it demonstrates “juridical equality, constitutional protections of individual rights, representative republican governments, and market economies based on private property rights.”⁵³

In the expressly international sense, the identity of liberal states is shaped in contrast with the record of aggression which their non-liberal counterparts have established over centuries. Liberal states, as Immanuel Kant long ago noted, need not make war on each other.⁵⁴ More specifically, the character of liberalism in the international domain exhibits a number of facets which, together, are able to explain, in large degree, the success of a regime of international rules in ordering peaceful relations between states.

Given that most individuals, and the governments which comprise them, are interested in progressive improvements in their circumstances, and that peace, prosperity, justice and freedom are the most fundamental precursors of more differentiated progress in outcomes,⁵⁵ it may be asserted that liberalism is capable of

transgovernmental order. Today's international problems - terrorism, organised crime, environmental degradation, money laundering, bank failure, and securities fraud - *created* and sustain these relations (emphasis added).

Slaughter, A. (1997). The real new world order. *Foreign Affairs*, 76 (5), 183-197. At 184.

⁵²Burley, A. (1992). Law among liberal states: Liberal internationalism and the act of state doctrine. *Columbia Law Review*, 92 (8), 1907-1997. At 1909.

⁵³*Ibid.* In the case of Australia, political liberalism has preceded the establishment of republican government. The referendum on the establishment of an Australian republic, held in November 1999, did not fulfil the third of Burley's four criteria. Furthermore, Australia still lacks a constitutionally-enshrined Bill of Rights for the protection of individual rights.

⁵⁴*Ibid.* Kant, I. (1932). *Perpetual Peace*. New York: Columbia University Press. Liberal states have, of course, a long history of belligerent behaviour directed against a wide range of non-liberal and totalitarian states.

⁵⁵Zacher, M. W., & Matthew, R. A. (1995). Liberal international theory: Common threads, divergent strands. In C. W. Kegley (jr.) (Ed.), *Controversies in international relations theory: Realism and the neoliberal challenge*. (pp. 107-150). New York: St. Martin's Press. At p. 109.

producing this result. The liberal ethos, which looks to gradualism, reason, diversity, optimism, individualism, egalitarianism and universalism, also has faith in the potential of all social and political arrangements for improvement.⁵⁶ Again, it does not seek unattainable perfection, but an international balance of interests which is negotiated under non-coercive conditions, and results in high levels of cooperation between states, to the mutual benefit and enhanced freedoms of the individuals within them.⁵⁷

With these goals in mind, liberal states demonstrate their willingness and ability to cooperate in the international sphere to the extent that they display the components of liberalism noted above. In order to do so, they acknowledge the primacy of universal *rules* and *norms* of behaviour which are essential for ordered, non-coercive coexistence in the absence of a sovereign.

It is not centrally important to states that a rule they will follow is generally or explicitly described as law, or as “a law”. Certainly, many such rules are described as law, and derive a measure of their legitimacy from that description. Others could not be unequivocally described as “legal” rules, but may nevertheless generate within a state a perceived obligation to be bound by them (perhaps on grounds of comity, reciprocity, coherence or validity).⁵⁸

The ambivalence evident here is derived from the duality inherent in the nature of relations between states; their engagement with both law and politics in the international arena, which in turn has generated the modern scholarly disciplines of International Law and International Relations. The nature of the two disciplines, and the evolution of an interdisciplinary focus better able (than either one of them) to approach the actual shape and dynamics of the international system will be addressed below.

⁵⁶*Ibid.*

⁵⁷*Ibid.* At p.110.

⁵⁸*Supra.* At Note 39. An example of such non-legal rules is so-called “soft law”, an early example of which was the *Stockholm Declaration on the Human Environment*, 1972 [UN Doc. A/CONF. 48/14 7 Corr. 1 (1972)]. Its aims, although not binding on states in a legal sense, nevertheless formed the basis for the ensuing expansion and consolidation of international environmental law.

The Relationship Between International Law and International Politics

The relationship between public international law and international politics,⁵⁹ which forms a crucial aspect of the interdisciplinary framework of the study, can be understood from three distinct perspectives, or conceptual levels. At the primary level, they are, at base, two sides of the same coin. In other words, at least in respect of international law on the use of force by states, *the legal is the political*, and *vice versa*.⁶⁰ It must be emphasised here that such a maxim does not seek, in any way, to privilege one domain over the other, but, rather, asserts the disciplinary duality inherent in any consideration of the use of force by states.

Secondly, it is possible to argue, in the United Nations era of positive international law (extant largely in the form of multilateral conventional instruments) that the world of independent, self-interested nation-states generates and exercises a voluntary rule of law which regulates relations between them.⁶¹ This form of international law, which in many cases codifies existing customary law (such as the humanitarian laws of war) suffers from the significant disability that its capacity to provide benefits for individual persons is, in most cases, filtered through

⁵⁹The terms "international politics" and "international relations" are interchangeable in this study.

⁶⁰One recent attempt to bring together the dichotomy created by the divergent world views of the political scientist and the international lawyer is Keohane's attempt to describe the "causal pathways and ... common nodes" which link the " 'instrumentalist' and the 'normative' 'optics' " or perspectives. He characterises the former as focusing on interests as the primary engine of state action, and the latter as a reliance on the "legitimacy" of international law, which is related to the process by which law is created, its consistency with accepted general norms, and its perceived fairness or specificity.

The "causal pathways and common nodes" which connect the two are taken by Keohane to be (a) the interests of policy elites, (b) the concern of policy-makers for reputation, and (c) the role of institutions within the modern state. By conflating the instrumentalist *political* ethic ("optic") with the normative *legal* one, he calls for a productive interdisciplinary synthesis, rather than narrow compartmentalism. Keohane, R. (1997). International relations and international law: Two optics. *Harvard International Law Journal*, 38 (2), 487-499.

⁶¹The wide and growing literature focusing on the role of international law in explanations of the nature of international society, and of international security, has been addressed by Makinda in an article which emphasises the importance of Hedley Bull's earlier work, *The Anarchical Society*, in defining the functions of realism and pluralism in the development of global order and justice. Makinda, S. (1997). Hedley Bull and post-Cold War security. In G. Crowder, H. Manning, D. S. Mathieson, A. Parkin, & L. Seabrook (Eds.), *Australasian Political Studies 1997: Proceedings of the 1997 APSA Conference, Volume 2* (pp. 653-668). Adelaide: Flinders University, Department of Politics.

the veil of state personality and responsibility. The outcome is an increasing tendency for conflict, at law, between the interests of nation-states, and those of individuals.⁶²

Finally, in terms of the focus of this study, the concept of “aggression” plays a pivotal role in modulating the conceptual relationship between international law and international politics in any analysis of the lawfulness of nuclear deterrence policies, and of the possession of nuclear weapons themselves.⁶³ The 1968 *Nuclear Non-Proliferation Treaty* stands as an attempt to limit the extent and consequences of aggression, which, as Walzer states, “is the name we give to the crime of war,”⁶⁴ and which Article 2 (4) of the Charter of the United Nations proscribes.⁶⁵

Since the consequences of aggression are the denial of communal and individual political (and other human) rights, the NPT can be regarded as both a legal and a political document, which mandates action by imposing rules and imparting legal and political penalties for non-compliance on all nation-states. As a result, those who debate the continuing utility of the NPT will inevitably be influenced by their own view of the importance to states of crude national interest⁶⁶ as against the normative value (to states themselves, and to individuals) of the legal regime established by the UN Charter.

⁶²Douglas Roche, a former Canadian Ambassador for Disarmament, has commented that the erosion of morality as a foundation for human solidarity, together with the re-emergence of narrow nationalisms fortified by adversarial systems of international relations (rooted in a concept of absolute national sovereignty) have combined to overturn the vision of a “world community of people.” Roche, D. (1988). Opening address. In M. Cohen & M. E. Guin (Eds.), *Lawyers and the nuclear debate* (pp. 11 - 14). Ottawa: University of Ottawa Press. At p. 13.

⁶³*Ibid.* Cohen, M. Introduction . At p. 5.

⁶⁴Walzer, M. (1977) *Just and unjust wars: A moral argument with historical illustrations*. New York; Basic Books. At p. 51.

⁶⁵See Appendix 1.

⁶⁶Morgenthau, H. J. (1971). *Politics among nations: The struggle for power and peace* (4th rev. ed.). New York: Knopf. Introduction.

The Interdisciplinary Perspective

The central interdisciplinary idea, which links the international lawyer with those who develop theories on inter-state relations (and which is also of primary analytical significance for this study) is the notion of *international rules*. At its most basic conceptual level, the ordering of the affairs of the international system is accomplished through the legitimated development and application of prescribed norms of behaviour within whose parameters agents are to pursue their interests and attain their ends.⁶⁷

Thus, the nation-states are guided in their relationships by a broad range of rules and norms of behaviour which are, in most instances, widely accepted among them as representing a minimum standard or benchmark beyond which, for those who breach them, appropriate and coordinated consequences may be expected to flow.⁶⁸

The Law of Nations - the modern state-based institution of public international law - traces its origins back to the customs and practices, over many centuries, of European sovereign princes and polities. Before the advent of the discipline of international relations following the end of World War I, relations between states had, to a large extent, been moderated through the customs and practices of international law. The international institutions through which state decision and action flowed were, effectively, *legal* institutions, rather than ordered regimes or agreements underpinned by undifferentiated political pragmatism or realism.⁶⁹ Thus, for example, the customary law rules of occupation, reprisal and just war, and the limited and subsidiary rule-sets of international organisations

⁶⁷Kratochwil, F. V. (1989). *Rules, norms, and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs*. Cambridge: Cambridge University Press. At pp. 10, 11.

⁶⁸The economic sanctions imposed by the UN on Iraq following the end of the Second Gulf War in 1991 is only one highly visible example of the coordinated action of states against a recalcitrant.

⁶⁹Scupin, H. (1992). History of the Law of Nations 1815 to World War I. In R. Bernhardt (Ed.), *Encyclopedia of public international law* (pp. 767-793). Amsterdam: Elsevier. One of the most effective ways in which the international law of Europe was embedded further afield was the use of the legal institutions of diplomatic missions (for example, the protection of diplomatic representatives) and the law of reprisal, in order to compel states to abide by the international law which they had decided to adopt, and later found inconvenient. At p. 774.

(whose capacities and obligations were constituted by treaty),⁷⁰ although often impelled by political imperative, nonetheless inhabited a legal domain. In effect, the legal and political dimensions of international relations were indistinguishable.

The beginning of a focus by scholars on international relations in the aftermath of the first global conflict, and especially on its pacific Wilsonian idealism (the essence of which was embodied in the failed League of Nations), did nothing to bring together the two strands of scholarship, both of which were directed primarily at explanations and ordering of state behaviour. In effect, the “legalist/moralist” political traditions of liberal states were simply not appropriate, in the minds of realist international political thinkers, within a *milieu* in which self-interest, power and anarchy were the primary functional elements.⁷¹ The intellectual founders of post-Second World War realist international relations theory, Hans J. Morgenthau and George Kennan, were not willing, in the shadow of the second global conflict, to concede that a domestic or municipal conception of “law” had any place in the world of power.⁷²

From that time, and notwithstanding the efforts of some legal scholars⁷³ to respond to the “realist challenge,”⁷⁴ and the corresponding endeavours of international relations theorists to elaborate the crude realism of Morgenthau and his

⁷⁰*Ibid.* At pp. 779-781. Many international organisations instituted during the nineteenth century had technical or humanitarian cooperative aims. The need to coordinate transport and communication arrangements between states was central to this development, as was the growing humanitarian idealism which followed the 1864 *Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field* (the first Geneva Red Cross Convention). 18 *Martens Nouveau Recueil*, (ser. 1) 607, 129 *Consol. T.S.* 361. Entered into force 22 June 1865.

⁷¹*Supra.* At Note 34 (1993), pp. 207-209.

⁷²Morgenthau, H. J. (1973) *Politics among nations: The struggle for power and peace* (4th rev. ed.). New York: Alfred A. Knopf; Kennan, G. (1984). *American diplomacy, 1900-1950* (rev. ed.). Chicago: University of Chicago Press. Morgenthau cites the de-centralisation of the legislative, adjudicative and enforcement functions of international law as the reason for its imprecision, and hence its ineffectiveness, while Kennan rejects the legalist-moralist approach to international relations because of its central role in imbuing war (as the primary means of international law enforcement) with moral legitimacy. Beck, R. J., Arend, A. C. & Vander Lugt, R. D. (1996). *International rules: Approaches from international law and international relations*. Oxford: OUP. At pp. 95-98.

⁷³*Supra.* At Note 34, The legal response: Reconceptualising law and politics. At pp. 209-214. Slaughter-Burley characterises the legal response as a direct reaction to the realism of the period from the early post war years until the beginning of the nineteen nineties.

⁷⁴*Supra.* At Note 60.

followers, the two disciplines have largely followed separate evolutionary paths. There is only limited evidence of any substantial interdisciplinary trajectory, at least until the final decade of the twentieth century.⁷⁵ The two paths of scholarship had largely refused to acknowledge each other's legitimacy and epistemological coherence. This mutual intellectual blindness was fostered and reinforced by the bipolar Cold War world of nuclear confrontation, and tensions between the developed and developing world which often denied to international law a legitimate role in controversial arenas.⁷⁶

The result was that, until the early years of the 1990s, the two disciplines merely talked past each other, lacking sufficient common ground on which to build bridges of insight between them.⁷⁷ As they did so, however, a number of points of potential confluence were evident. On one hand, the lawyers had not lost sight of the fact that international law which lacks coercive effect could - and, in fact, often did - structure international political processes and outcomes.⁷⁸

⁷⁵*Supra*. At Note 34, "The political response: Refining and modifying realism." At pp. 214-220.

⁷⁶Ratner, S. R. (1998). International law: The trials of global norms. *Foreign Policy (Spring)*, 65-80. At 66. Ratner refers to the examples of the *General Agreement on Tariffs and Trade*, and to the 1982 *Convention on the Law of the Sea* to illustrate this point. [UN Doc. A/CONF. 62/122; 21 *ILM* 1261].

The United States became increasingly uninterested in the disarmament work of the United Nations General Assembly, and wary of the moral pressure its pronouncements could engender, after control of the majority within it passed from the West to the growing group of new states formed on the dissolution of the European colonial empires.

Thus, in 1967, the United States and the Soviet Union combined in the (then) 18-member Disarmament Committee in Geneva (which incorporated eight non-aligned states) to deny to the Assembly a detailed Report of the Committee's deliberations. In this way, they avoided any possibility of a General Assembly Resolution strongly critical of its efforts and achievements. Fischer, G. (1971). *The non-proliferation of nuclear weapons*. (D. Willey, Trans.). London: Europa. At pp. 39-43.

⁷⁷Abbott, K. W. (1989). Modern international relations theory: A prospectus for international lawyers. *Yale Journal of International Law* (14), 355-409. At 337. This article marks the first recent attempt overtly to bring together the international lawyers and international relations theorists by suggesting that their epistemological positions were not incommensurable. Specifically, and as a Professor of Law, Abbott suggested that the "analytical approaches, insights and techniques of modern IR theory ... can readily be applied to a variety of legal norms and institutions." He also noted the "immense reservoir of information about legal rules and institutions [which IL can offer to modern IR scholars], the raw material for the growth and application of theory." At pp. 339-340.

⁷⁸It was the belief of the fifty-one states at the 1945 San Francisco Conference that positive international law was essential to the future security of the world that provided the fundamental impetus behind their agreement to constitute a United Nations Charter open to all "peace-loving states." *UN Charter*, Article 4 (1). See Appendix I.

International relations theorists, in turn, themselves acknowledged that politics is, in fact, conditioned by law. As Keohane has noted:

Law does not necessarily determine behaviour, but politics is conditioned by law and by legal institutions. Political choices on issues such as compliance with commitments cannot be understood without legal analysis, cast, however, within the positive theoretical and methodological orientation of the social sciences.⁷⁹

Concessions such as this, by a prominent international relations theorist in 1992, are indicative of the growing realisation that much beneficial interdisciplinary scholarship may flow from greater levels of recognition between the two intellectual paradigms.

In this spirit, both sides of the debate have begun to acknowledge the converse generality: that international law does not inhabit a legal realm in which its structure and precepts are immune from the processes of relations between states, but that it can be, and indeed is, conditioned and elaborated through the political process. They have begun to recognise that international law is not immutable, or condemned to abide by the customary and conventional practices established and reified in times characterised by political, social and strategic realities far removed from the present day.

Thus, as the rate of global social and political change, in the domestic, trans-national and supra-national spheres, has continued to accelerate, the urgent need to renovate public international law in the face of its imminent irrelevance has been perceived and accepted by some international legal scholars and practitioners.⁸⁰

In summary, it is clear that practitioners and theoreticians of both international law and international relations are increasingly willing to acknowledge

⁷⁹Keohane, R. O. (1992). Compliance with international commitments: Politics within a framework of law. *Proceedings of the 86th Annual Meeting of the American Society of International Law* (pp. 176-180). Washington, D.C.: A.S.I.L. At p. 180.

⁸⁰Eyffinger, A. (1996). *The International Court of Justice 1946-1996*. The Hague: Kluwer Law International. He points out that the literature of international law has been transformed by the increasing focus on fields of law which had their genesis only in the post Second World War period, and largely from the nineteen sixties onward. Here, environmental law, the laws of space, human rights law and the law of development are examples of the changing face of public international law.

Unfortunately, the institution most appropriate for "encouraging the progressive development of international law and its codification" (as the General Assembly of the United Nations was encouraged to do at its 1945 San Francisco Conference), the International Law Commission, has been excessively cautious and formalistic in its work, preferring careful evolution to an existential acknowledgment of present needs and exigencies. At pp. 5, 170.

the benefits which closer cooperation can create. Each has the opportunity to “challenge, supplement or develop the ideas and techniques of [the other] on questions of common concern”⁸¹

In these circumstances, it is not surprising that the disciplines of international law and politics have begun to approach each other on the basis that they are both addressing essentially similar realities. Nor is it surprising that they nominate the phenomenon of rule-following behaviour by state and non-state actors as the bridge which links them, or that the two sides of the debate have chosen different approach routes to the interdisciplinary goal.⁸²

For the practitioners of international law, that route has involved a process in which a range of international lawyers have reconceptualised international law by moving it closer to politics and policy, and by moving away from *rules* towards *processes*, thereby increasing the range of functions which law is seen as performing. Instead of merely providing “triggers for sanctions,” a process-based international law could, they suggest, act to provide “communication, reassurance, monitoring and routinization.”⁸³

To this list must be added its existential legitimising effect. The distinction of international rules as rules of *law* bestows on them a cachet which is not available to non-law rules - even those which have been created, procedurally and

⁸¹*Supra*. At Note 34 (1998), p. 378.

⁸²*Supra*. At Note 67.

⁸³*Supra*. At Note 34 (1993), p. 209, 210-214. The most important early exponents of this conception of international jurisprudence have been Myres McDougal and Harold Lasswell who, in 1943, founded the New Haven school of policy-directed law which sought to politicise the process by which law is developed. By turning critique of the law towards a positivist social scientific approach, they sought to reinvent international lawyers as public policy specialists who were far better equipped than their forebears to develop international law for the enhancement of world order and security, and of human dignity. Lasswell, H. D., & McDougal, M. S. (1943). Legal education and public policy: Professional training in the public interest. 52 *Yale Law Journal* 203.

The New Haven approach has been elaborated by emphasising an autonomous “systemic” or “World Order” orientation of law which acknowledged its function both as a source of law rules, and an existential international code of conduct framed to meet the real needs of international society.

A corollary to the process-based orientation, and a pragmatic alternative, was to ascertain empirically the ways in which international law and legal institutions have, in fact, influenced international outcomes. This involved establishing evidence of causal relationships between the incentives and disincentives of international law in particular circumstances, and the decisions which states make. This perspective is significant in respect of Australia’s behaviour in relation to the negotiation of the NPT.

substantively, by a process which is widely acknowledged as legitimate. In the latter category, the “soft law” status of many international instruments, which are not legally binding on states, nevertheless may impact on international relations, and subsequently on international law itself.⁸⁴

This move within the international law academy towards recognition of the importance of the international political process may be regarded as acknowledgment that the institutions and conventions of international law - its customary law, treaty instruments and accepted principles of law - are, in fact, closely related to the concept of “institutions” used by analysts of international relations.

From this perspective, international law can be seen as encompassing many elements of the *institutionalist* position favoured by many international relations theorists. That position focuses on the rules in international life which moderate specific issue areas, on the organisations which oversee them, and on the “knowledge communities” which they create.⁸⁵ The enhanced certainty and credibility which international institutions can bring to an issue area (and not least to international nuclear anti-proliferation efforts) help states achieve collective gains through transparent negotiations and reiteration of problem-solving over many years.⁸⁶

On the international relations side, the route to interdisciplinary thinking has been one in which scholars have sought to explain, in a functional way, how international legal institutions work. One approach has been to examine, from an “iterative” perspective, a justification of the law of treaties (and of specific treaties) which holds that they should be designed to encourage *repeated* interactions between

⁸⁴ An example of “soft law” is the Final Act of the Conference on Security and Co-operation in Europe 1975 (the Helsinki Declaration). [14 *I.L.M.* 1292 (1975)].

⁸⁵ *Infra*. The most important early exposition of the institutionalist position, alternatively entitled “regime theory”, is Krasner, S. (1983). *International regimes*. Ithaca: Cornell University Press.

⁸⁶ Keohane, R. O. (1998). International institutions: Can interdependence work?. *Foreign Policy*, Spring, 82-96. At 82-87. As he states at 82:

To analyse world politics in the 1990s is to discuss international institutions: the rules that govern elements of world politics and the organizations that help implement those rules.

states, and that such a perspective can be generated from the insights of institutionalists working within the international relations discipline.⁸⁷

A second method, which omits the focus of the first on iteration, has been to consider the extent to which arms control treaties promote cooperative interactions between states, including a range of “dynamic obligations” which are reflected in reciprocal arrangements and understandings - of which the Cold War relationship between the United States and the Soviet Union is cited as an obvious example.⁸⁸

Finally, some international relations scholars have focused on the reasons that impel states to act through “formal” institutions, such as the legally constituted International Atomic Energy Agency and the World Trade Organisation. They conclude that *centralisation* and *independence* are key characteristics of international organisations which impel states to take them seriously.⁸⁹

Here, then, are three examples of scholarship, from within both the international law and international relations academics, which have as their aim an enhanced understanding of the operational functions of international law instruments - exactly *how* they work in a state-centric international system. Notably, all three include within their analyses various arms control and disarmament treaties (for example, the 1968 *Nuclear Non-Proliferation Treaty*, and the various SALT and START Agreements between the United States and the Soviet Union) as illustrative of their theses.

The outcome of this dual analytical effort, which the preceding discussion has addressed only in general terms, has been a convergence of the basic precepts and assumptions which each discipline has, until very recently, reserved for its own domain.⁹⁰ That convergence still has many miles to travel. There is no immediate

⁸⁷Setear, J. K. (1996). An iterative perspective on treaties: A synthesis of international relations theory and international law. 37 *Harvard Law Journal* 139. At 140.

⁸⁸Smith, E. M. (1991). Understanding dynamic obligations: Arms control agreements. 64 *S. Cal. L. Rev.* 1549. At 1551.

⁸⁹Abbott, K. W. & Snidal, D. (1998). Why states act through formal international organizations. *The Journal of Conflict Resolution*, 42 (1), 3 - 32.

⁹⁰*Supra*. At Note 34 (1993). *Oran Young, in 1992, injected a measure of realism into the enthusiasm of those then seeking an interdisciplinary dialogue. He observed that the resistance against such a discourse is not merely one of the distinction between two disciplines, but also one of cross-cultural opacity - Thus: “[W]e still operate in a haze of ambiguity.” Young, O. R. : Remarks by Oran Young. At p. 173.

prospect of a joint discipline of “international governance”, although the most productive points of contact have been made around the notion of international institutions and the rule-sets they administer.⁹¹ Perhaps the clearest expression of the interdisciplinary perspective in inter-state relations is Slaughter’s aphorism of 1993:

In the end, law informed by politics is the best guarantee of politics informed by law.⁹²

Potential for Theoretical Advance

The need for scholarship which is able to bridge the disciplinary and conceptual divide separating international law and international relations theory has been canvassed above. Within that rubric, enquiry into the propensity of states to act through international organisations, and the functional development of international nuclear proliferation law stand out as areas of research offering some prospect of successfully advancing understanding of the structures and dynamics of international affairs.

States and International Organisations

One important area of collaborative research which is already yielding results, and to which the study lends empirical support, is investigation into the ways in which states interact with formal international organisations, and the factors which impel them to do so. Both international lawyers and international relations theorists are

⁹¹ Another important focus of on-going scholarship is the influence of domestic factors on state behaviour in relation to international rules. This includes work by Slaughter to open the “black box” model of state behaviour through a “Liberal Agenda” which assumes individuals and private groups to be the principal political actors, all governments as minimally representative of at least some segment of society (whose interests are reflected in state policy), and that states’ behaviour is conditioned by the nature and configuration of their preferences. Beck, R. J. (1996). International law and international relations: The prospects for interdisciplinary collaboration. In R. J. Beck, A. C. Arend, & R. D. Vander Lugt (Eds.), *International rules: Approaches from international law and international relations* (pp. 3-30). New York: Oxford University Press. At pp. 12, 13.

⁹² *Supra*. At Note 34, (1993), p. 239.

now addressing the specific features of formally constituted international organisations (and the penumbra of informal agreements and understandings which often surround them) which allow them to respond effectively to international challenges or, alternatively, to restrict their utility.⁹³ For example, Abbott and Snidal, using a combined rationalist/constructivist approach, focus on the active functions of international organisations, and especially their centralising purpose and independent status.⁹⁴

From a more expressly international legal perspective, but using elements of international relations theory, Abbott has examined the role of information production and verification in the design of a range of arms control treaties, including the NPT.⁹⁵

In the present study, the International Atomic Energy Agency, charged with the verification of compliance with the provisions of the NPT by States Parties, stands out as an example of an international organisation which discharges its statutory obligations in the context of a range of informal understandings that infuse the entire domain of nuclear proliferation and disarmament.

The data used to analyse Australia's role in the development of the NPT reveal the ways in which a state, with limited relevant experience to guide it, engaged an international organisation with a global mandate over the crucial question of the spread of nuclear weapons around the world.

The problems and concerns which Australia expressed, both publicly and privately, about the effectiveness and operational shortcomings of the IAEA are evidence of its perception of the Agency's organisational deficiencies. To that extent, the study adds to the sum of information available to scholars and others engaged in the design, commissioning and evaluation of international security organisations which are intended to perform regulatory or verification functions.⁹⁶

⁹³ *Supra*. At Note 89, p. 5. Abbott, K. W. (1993). "Trust but verify".** The production of information in arms control treaties and other international agreements. 27 *Cornell Int'l L.J.* 1.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* (1993). At p. 34. Elementary game theory models, such as the Prisoner's Dilemma, are used as a tool to focus on the strategic structure of interdependent relationships.

⁹⁶ One recent example of an organisation which has been newly created to meet a security requirement is the Organisation for the Prohibition of Chemical Weapons (OPCW), established as a consequence of

Its focus on circumstances now over thirty years old provides an opportunity to reassess the degree of progress achieved by organisational designers (especially international lawyers and international negotiators) in enhancing levels of functional efficiency within international organisations in the arms control arena, and their relevance to emergent political challenges.⁹⁷

Nuclear Proliferation Law

While study of the dynamics of relations between states and international organisations is an overtly interdisciplinary project equally amenable to a growing number of international lawyers and theorists of international organisations, the development of nuclear proliferation law, *as law*, is more closely allied to the work of the international lawyer. By maintaining the rate and scope of development in this area of the international law on security (and more specifically on arms control and disarmament) international law scholars and practitioners will contribute in large measure to its continuing relevance and strength.

This study is relevant to the development of international law on arms control and disarmament by providing evidence of the successful negotiating strategy used to conclude the terms of the 1968 *Nuclear Non-Proliferation Treaty*.

The NPT was negotiated in large part by the two Cold War superpowers. Although the national interests of the United States and the Soviet Union coincided, in this instance, with those of almost all other states, the negotiation of the terms of the NPT was not undertaken in a universal international forum.⁹⁸ Instead (in

the 1993 *Convention on the Prohibition of the Development, Stockpiling and Use of Chemical Weapons and On Their Destruction* (the Chemical Weapons Convention). *Organisation for the Prohibition of Chemical Weapons* (2001). [on-line]. Available WWW: <http://www.opcw.nl/>.

⁹⁷The Secretariat of the IAEA contains a number of Groups aimed at instituting improvements to the Agency's policy and implementation strategy. The Standing Advisory Group on Technical Assistance and Co-operation, and the Standing Advisory Group on Safeguards Implementation, among others, perform this function. Thus, the *structure* of this vital international organisation allows for its progressive development in ways which, since they are based on operational experience, enable it to fulfil its remit in a rapidly changing verification environment. Center for Nonproliferation Studies (1996). *Inventory of international nonproliferation regimes*. [on-line]. Available [www: http://cns.miis.edu/cns/inventory96/globalorg.html](http://cns.miis.edu/cns/inventory96/globalorg.html)

⁹⁸There may well have been sufficient political will, during 1967 and 1968 (as is indicated by the rapid accession of a large number of states to the NPT itself following its opening for signature on 1 July 1968) for an International Conference on nuclear proliferation convened under the auspices of the

consultation with the its NATO allies) negotiation remained at a private, bilateral level between the US and the Soviet Union, and at a secondary, adjunctive level in the Eighteen Nation Disarmament Committee in Geneva.⁹⁹ Nevertheless, the documentary evidence used in the study indicates that the United States was willing to consult with Australia, in some detail, on the text of the draft treaty as it developed.

The United States expressed its readiness to acknowledge Australia's status as a stable and influential "middle power" on the international stage, and *ipso facto* the significance of its policy towards the Treaty. An accommodation of divergent national interests, even as between allies, was the result.¹⁰⁰ America was ready, pragmatically, to concede that Australia's concurrence with its interpretation of the terms of this most important of multilateral treaties was likely to have a marked effect on the willingness of other middle-level developed states (and, importantly, developing states around the world) to accede to them.

This indicates that further research may prove useful in testing the widely held view that the middle-level powers have been largely unable to influence the course of world events since 1945, especially in relation to global security concerns.¹⁰¹ That view has held that states with a "middle-power" status were limited - by their established political alliances, or through their cultural or religious allegiances - in the nature and strength of their influence over the Great Powers.¹⁰²

Secretary-General of the United Nations.

⁹⁹ The United States and the Soviet Union submitted identical draft treaty texts to the ENDC on 24 August 1967, which were subsequently revised twice at that forum, and once more in the UN General Assembly. The final form of the treaty text was approved by the Assembly on 12 June 1968. Epstein, W. (1976). *The last chance: Nuclear proliferation and arms control*. New York: The Free Press. At pp. 70-86.

¹⁰⁰ As this study will reveal, the United States' desire to see the NPT successfully concluded and adopted was the impulsion behind its surprising degree of consultation over its terms with a moderately important ally in the South West Pacific region.

¹⁰¹ This observation is made in the context of the ability of individual states to bring both diplomatic and legal pressure to bear on the most economically and militarily powerful post-war states: the United States, the former Soviet Union, Russia, the Republic of China, the United Kingdom, France, Japan, [West] Germany and Italy. Over the past decade, international organisations such as NATO and the European Union may be added to this list.

¹⁰² *Ibid.*

The conclusions drawn by this study indicate that other factors, in specific circumstances, may combine to propel middle-ranking states to a position of influence beyond what their economic, military and geopolitical circumstances might suggest.

To the extent that this is so, such states are able to modulate (and moderate) negotiations between their more powerful counterparts, whether within the ambit of the United Nations, or externally. This may have significant consequences for the development of nuclear proliferation law, in which the ultimate goal is a universal Nuclear Weapons Convention (similar to the 1993 Chemical Weapons Convention) which completely eliminates these devices.

Methodology

The study begins by identifying its purpose, as outlined above. Its goal is to analyse the evidence described below to enable new conclusions to be drawn about Australian sources of legal and political influence modulating the development of international law on nuclear proliferation. In order to do so, it establishes two broad, interrelated research goals, rather than a single general hypothesis, in the belief that this methodology provides the study with the flexibility required for its analysis of a complex matrix of interdependent factual situations and causal relationships.

On one hand, the study focuses on Australia's role in the genesis and early evolution of the NPT. At the same time, it seeks to place that role within the wider context of the influence of middle powers allies of the United States in globally significant arms control negotiations.

It should be noted that the study's research goal concerning the ability of middle-ranking states to modify the outcome of bilateral and multilateral negotiations aimed at developing international nuclear proliferation law demands the use (unavoidable in this methodology) of inductive reasoning to derive its conclusions.

The study collects documentary evidence on the period of negotiation of the 1968 *Nuclear Non-Proliferation Treaty* which was generated by Australian

Ministers of the Crown, their representatives, and Australian Government departments and agencies. The most significant departments are the Departments of External Affairs, Prime Minister and Cabinet, and National Development, while the most important government agency is the Australian Atomic Energy Commission.

The evidence mostly takes the form of archived documents which record the deliberations of the Australian Government in the context of the formulation of national policy concerning accession to the Treaty, and the alternative strategy of developing an independent nuclear strike force as a deterrent against external aggression. It includes, *inter alia*, a wide range of discussion, analysis and position papers, Submissions to Cabinet, technical assessments, diplomatic cables and Cabinet Decisions.

Documents generated by Australian diplomatic missions abroad record, in detail, the extent of consultations which occurred between Australian diplomatic representatives and their counterparts from the United States, the United Kingdom and other states, as well as international institutions such as the International Atomic Energy Agency and the United States Arms Control and Disarmament Agency. All documents are in the public domain, having been declassified in 1998 under the terms of the Australian federal "thirty-year rule" on the release of government material for public scrutiny under the direction and control of the Australian National Archives.

These documents form, almost exclusively, the primary material used in this study, which relies on their strongly authenticated provenance in the absence of corroboration from the interview of individuals, or the government records of other relevant states.

Analysis of the collected data will proceed having regard for the theoretical and meta-theoretical considerations discussed above, in order to develop a coherent, consistent and reasoned argument which is based firmly on the evidence contained in the materials to hand.

Review of Literature

The general literature relevant to this study is divided between the literature on the negotiation of the NPT and that on the international law of nuclear proliferation. That relevant to the process of negotiation between states which led to the NPT may be characterised as fragmented and sparse, while the literature on the international law of nuclear proliferation is more extensive and cohesive.

In terms of the processes and events which led to the Treaty's formulation and initiation, the most comprehensive treatment is that contained in the three volume study by Shaker,¹⁰³ whose work provides, in Volume I, an exhaustive chronology of the foundation and course of negotiations undertaken during the drafting of the Treaty. Notably, however, it takes little account of the involvement of America's non-NATO allies.

Shaker's study forms the basis from which the present research will move forward as it clarifies Australia's part in the NPT negotiating process. Using a framework which focuses principally on the various institutions of the United Nations Organisation, such as the General Assembly and the former Eighteen Nation Committee on Disarmament, Shaker traces the public (i.e. UN-modulated) path of negotiations between 1961 and 1968, rather than that of inter-governmental discussions. His reliance on United Nations documents, with limited reference to secondary analytical literature and government (especially United States Government) primary source material, leaves room for re-formulation of this section of an important work to include data on the United States' relevant negotiations with Australia over the NPT.

While Shaker provides a valuable compendium on the UN-based negotiations, the general literature on the negotiation of the Treaty is enhanced by a secondary component which may be described as more discursive, speculative and analytical. An early example, which claims to present controversial facts without

¹⁰³ Shaker, M. I. (1980). *The Nuclear Non-proliferation Treaty: Origin and implementation 1959-1979* (Vols. I, II, & III). London: Oceana.

bias, is Mastny's *Disarmament and nuclear tests 1964-69*,¹⁰⁴ which follows a chronology of annual events between 1964 and 1969 relevant to nuclear disarmament as he assesses the rate of progress in negotiating arms control and nuclear non-proliferation measures. The work's utility lies in its amalgamation of political aspects of those events with their purely UN-grounded or international law dimensions, rather than its alleged value-neutrality.

A further useful analysis of the negotiation process, written from the perspective of the international lawyer, is that contained in Singh and McWhinney's *Nuclear weapons and contemporary international law*,¹⁰⁵ an authoritative work of much wider scope in the area of nuclear weapons and contemporary international law. The authors, of whom the first is a former President of the International Court of Justice, provide a worthwhile counter-point to the generally positive tenor of texts dealing with the Treaty negotiations, taking a less than optimistic view of the juridical effects of the security guarantees made by nuclear weapons states to non-nuclear States Parties.¹⁰⁶ Part of this work's value lies in the fact that its original 1959 edition was heavily revised by McWhinney in 1989 to reflect the many changes discernible in the legal status of nuclear weapons over the thirty year period leading up to the end of the Cold War.

A complementary text, part of a wider work on nuclear proliferation and arms control, is Epstein's *The last chance: Nuclear proliferation and arms control*, a study of the NPT negotiations in the decade from 1958 to 1968.¹⁰⁷ He introduces the origins and earliest directions, from 1958, of bilateral diplomacy and UN General Assembly discussions which eventually resulted in General Assembly Resolutions, and in the Treaty itself. To that extent, it completes the temporal scope of the negotiation process, while emphasising the perception, expressed by states such as Brazil and India, of its fundamentally discriminatory nature.

¹⁰⁴ Mastny, V. (Ed.), (1970). *Disarmament and nuclear tests 1964-69*. New York: Facts on File, Inc.

¹⁰⁵ Singh, N., & McWhinney, E. (1989). *Nuclear weapons and contemporary international law* (rev. ed.). Dordrecht: Martinus Nijhoff. At Chapter 21.

¹⁰⁶ *Ibid*, at p.241.

¹⁰⁷ Epstein, W. (1976). *The last chance: Nuclear proliferation and arms control*. New York: The Free Press. At Chapter 5.

These works are a representative sample of the book and monograph-based literature on the NPT negotiation process. As stated above, this part of the general literature is fragmented, having no readily discernible structure, or an obvious rise in the sophistication of its analysis, which can be broadly characterised as descriptive and speculative.

This judgment is supported by the few articles which address the negotiation process systematically, although these tend to be more forthright in their stated positions than the longer works. One example is Dougherty's article, "The Treaty and the Nonnuclear States", published in 1967,¹⁰⁸ in which he examines the dilemmas faced by nuclear-capable states such as Argentina, Brazil and Sweden in deciding whether to join or remain outside the NPT regime. The thrust of Dougherty's argument is that those states (and many others) saw little alternative to accepting entrenched discrimination almost as a *fait accompli*.

Erlich's 1970 article on the NPT and peaceful uses of nuclear explosives,¹⁰⁹ although now substantially irrelevant,¹¹⁰ adds to this realism by pointing out that the initial draft of the Treaty, submitted by the Soviet Union and the United States, contained no commitment to limiting their own nuclear weapons.¹¹¹

Another contemporaneous attempt to analyse the process by which the NPT was negotiated, and one which is useful in view of its comprehensiveness, analytical rigour, and reliance on US Government documentary sources, is Firmage's 1969 article "The treaty on the non-proliferation of nuclear weapons".¹¹² Its most significant contribution, and one which indirectly underpins the middle-power

¹⁰⁸ Dougherty, J. E. (1967). The treaty and the nonnuclear states. *Orbis*, 11 (Summer), 360-377.

¹⁰⁹ Erlich, T. (1970). The nonproliferation treaty and peaceful uses of nuclear explosives. *Virginia Law Review*, 56 (4), 587-601.

¹¹⁰ *Ibid.* At 594. The use of nuclear explosions in civil engineering projects, oil recovery, waterway diversion and the like, envisaged by the terms of Article V of the NPT, has never been attempted.

¹¹¹ *Ibid.* At 590.

¹¹² Firmage, E. B. (1969). The treaty on the non-proliferation of nuclear weapons. 63 *A.J.I.L.* 4. 711-746. This analysis of the Treaty negotiations relies heavily on: *International negotiations on the Treaty on the Non-proliferation of Nuclear Weapons* 93-94 (1969). Washington, DC: United States Arms Control and Disarmament Agency.

theme of the present research, is its assertion of the striking degree of collaboration between the United States and its European NATO allies throughout the negotiation process.¹¹³

The above describes the extent and nature of the general literature relevant to the negotiation of the terms of the NPT, from both an international law and political/diplomatic perspective. The general absence of data on, and analysis of, the involvement of United States allies (including Australia) is the lacuna which the present research will eliminate.

The literature covering the international law of nuclear proliferation is extensive. As a well-developed component of customary law through the practices of states, and of conventional law through multilateral treaties, its broad structure and developmental pathways are comprehensively described in any volume covering the broad sweep of international law.¹¹⁴ However, a more extensive and focused secondary literature exists which places the international law of nuclear proliferation within the context either of the wider "Law of Disarmament," or of the narrower arena of nuclear arms control *per se*.

An early example of the former set, useful as a comparative base for later works, is Gotlieb's 1965 book, *Disarmament and International Law*,¹¹⁵ written from a Canadian perspective on nuclear disarmament law extant during the early stages of negotiations leading to the NPT. It presents a valuable insight into the relevant international legal framework of disarmament, as perceived from within a middle-ranking Western power with significant constitutional, political and international similarities to Australia.

The 1986 Report of the Australian Parliamentary Joint Committee on Foreign Affairs and Defence, *Disarmament and Arms Control in the Nuclear Age*¹¹⁶

¹¹³ *Ibid.* At 718.

¹¹⁴ One authoritative example is: Jennings, R. & Watts, A. (Eds.). (1992). *Oppenheim's international law, volume 1: Peace* (8th rev. ed.). Harlow: Longman.

¹¹⁵ Gotlieb, A. (1965). *Disarmament and international law: A study of law in the disarmament process*. Toronto: The Canadian Institute of International Affairs.

¹¹⁶ The Parliament of the Commonwealth of Australia: Joint Committee on Foreign Affairs and

(which took expert evidence from a wide range of senior actors in the nuclear disarmament domain) provides a more recent and comprehensive appreciation of the scope of issues surrounding arms control generally, and includes within its analysis many proliferation issues of concern to Australia. Its introductory comments on the dearth of Australian published material on the “nuclear debate” is significant for the present study, while its most directly relevant recommendation urges the strengthening of the NPT regime.

The Report is complemented and enhanced by Dahlitz and Dicke’s edited *Proceedings of the 1991 Geneva Symposium on the International Law of Arms Control and Disarmament*,¹¹⁷ which purports to be the result of the first gathering of its type, and is undoubtedly important in view of the expertise of its participants. The reported contributions of academic lawyers, international legal practitioners, bilateral and multilateral negotiators, and UN-based specialists make this volume a valuable source of data and analysis relevant to the present research. Significant contributions address the practical problems of multilateral arms control treaties,¹¹⁸ problems of arms control treaty interpretation,¹¹⁹ and the process of achieving effective arms control law.¹²⁰

A further component of the secondary literature on disarmament law, written in a more “legalistic,” less discursive style, is Lysen’s 1990 work, *The Law of Disarmament*.¹²¹ This study is useful in its attempt to discriminate in a careful, yet straightforward, way between the public international law of disarmament (including its non-proliferation component) and its political or technical aspects. It does so by placing the relevant agreements within the *boundaries* of law, an important exercise for an ever-changing area of international law.

Defence. (1986). *Disarmament and arms control in the nuclear age*. Canberra: AGPS.

¹¹⁷ Dahlitz, J., & Dicke, D. (Eds.). (1991). *The international law of arms control and disarmament*. New York: UN Publications.

¹¹⁸ *Ibid.* Elaraby, N. (1991). *Practical problems with multilateral arms control treaties* (pp. 45-57).

¹¹⁹ *Ibid.* Ronzitti N. (1991). *Problems of arms control treaty interpretation* (pp. 115-125).

¹²⁰ *Ibid.* Jasentuliyana N. (1991). *The process of achieving effective arms control law* (pp. 179-200).

¹²¹ Lysen, G. (1990). *The law of disarmament*. Uppsala: Iustus Forlag.

In terms of the literature on the international law of non-proliferation written explicitly in the context of nuclear arms control, an important interdisciplinary study is Dahlitz' 1983 work, *Nuclear Arms Control with Effective International Agreements*.¹²² Its value lies in its focus on international systems for the creation, implementation, observance, verification and enforcement of nuclear arms control agreements, as well as the general principles of international conflict resolution.

Singh and McWhinney's 1989 study, *Nuclear weapons and contemporary international law* is of more general relevance in terms of its authoritative and comprehensive analysis of many aspects of international law as it relates to nuclear weapons. As such, it can be considered the most significant general reference source in this part of the literature (not least since it must be regarded as a subsidiary source of that law).¹²³

Of similar professional stature, and thus significant for the purely international legal component of this study, is Cohen and Gouin's edited *Proceedings of the 1987 Canadian Conference on Nuclear Weapons and the Law: Lawyers and the Nuclear Debate*.¹²⁴ Those participating, ranging from senior international lawyers (Greenwood, Rostow) and nuclear physicists (Teller) to arms control bureaucrats and representatives of international anti-nuclear NGOs, addressed the practical difficulties faced by lawyers working within the international law of nuclear weapons. To that extent, this volume is a usefully pragmatic expansion beyond theoretical analysis to the experience of the present-day practitioner and negotiator.

Meyrowitz' 1990 *Prohibition of Nuclear Weapons: The Relevance of International Law* is a dense analysis of the legal status of nuclear weapons¹²⁵ (now

¹²² Dahlitz, J. (1983). *Nuclear arms control [with effective international agreements]*. Melbourne: McPhee Gribble.

¹²³ *Supra*. At Note 105. Its status as a subsidiary source of international law is defined in Article 38 (d) of the Statute of the International Court of Justice (Charter of the United Nations). See Appendix III.

¹²⁴ Cohen, M., & Gouin, M. E. (Eds.). (1988). *Lawyers and the nuclear debate*. Ottawa: University of Ottawa Press.

¹²⁵ Meyrowitz, E. L. (1990). *Prohibition of nuclear weapons: The relevance of international law*. Dobbs Ferry, NY: Transnational Publishers.

partially resolved by the 1996 *Nuclear Weapons Case* in the International Court of Justice).¹²⁶ It provides one of the clearest expressions in the recent literature of the view that international law is capable of exerting decisive inhibiting influence over the threat or use of these devices. By extension, it is a useful marker for the present research in the arena of the development of nuclear non-proliferation law and policy.

The above illustrates the range of literature on the international law of non-proliferation of nuclear weapons relevant to the present research, in terms of its grounding in the law as it has developed, and as it currently exists.

The review of the literature on Australian nuclear policy between 1945 and the present will be divided between that which addresses the broad sweep of issues and events within Australian nuclear policy, and that with most direct relevance to the present proposal.

The literature on Australia's nuclear policy from 1945 to 1998 is neither extensive nor internally coherent. Few large works address the range of issues arising during the past fifty years within either Australia's domestic nuclear policy agenda, or its relevant international legal and political relationships, at least in an organic or comprehensive way. Rather, the literature consists primarily of highly focused analyses, in the form of journal articles and monographs, of specific sectors of the nuclear policy agenda, or of those issues perceived as carrying most significance over particular periods.

In the former category, the earliest attempt by the academy to describe Australia's nuclear policy agenda is Millar's 1967 monograph *Australia's defence policies 1945-1965*.¹²⁷ Almost as an afterthought, Millar alludes - in general terms - to Australia's willingness to allow British tests of nuclear devices on its territory, while eschewing a nuclear capability of its own on the basis of American assurances of nuclear protection.

¹²⁶ 35 *I.L.M.* 809 (1996).

¹²⁷ Millar, T. B. (1967). *Australia's defence policies 1945-1965*. Canberra: Australian National University.

A more useful early work, which purports to be the first coherent treatment of the technical and political aspects of Australian nuclear weapons acquisition, is Bellany's 1972 book *Australia in the Nuclear Age*.¹²⁸ Its main significance lies in the fact that its author saw such acquisition as a credible option for Australia at that time.

A further advance is represented by the edited proceedings of a conference held in 1974 at the Strategic and Defence Studies Centre, Australian National University: *The strategic nuclear balance: An Australian perspective*. Here, Desmond Ball surveys the implications for Australia of changes to the United States' nuclear strategic doctrine known as the "counter-force" or *Schlesinger* doctrine. He concludes that the implications of this development involve the increased vulnerability of US military facilities in Australia to nuclear attack.¹²⁹ In the same volume, which marks a significant advance over previous work in the depth and sophistication of its analysis, Hedley Bull advocates the founding of Australia's security strategy on broadly-based arms control arrangements and practices.¹³⁰

From a more populist perspective, Walsh and Munster attempted in 1980 to publish *Documents on Australian defence and foreign policy 1968-1975*,¹³¹ using then-secret and embargoed government documents. Their action resulted in a High Court injunction ordering the volume's destruction after publication. That work, and the authors' 1982 review of the earlier work, *Secrets of state*,¹³² are relevant to the present research for their use of core departmental documents. More specifically,

¹²⁸ Bellany, I. (1972). *Australia in the nuclear age: National defence and national development*. Sydney: Sydney University Press.

¹²⁹ Ball, D. J. (1975). United States strategic doctrine and policy - with some implications for Australia. In R. O'Neill (Ed.), *The strategic nuclear balance: An Australian perspective*. (pp. 36-57). Canberra: Australian National University Press.

¹³⁰ *Ibid.* Bull, H. (1975) Australia and the nuclear problem: Some concluding comments. (pp. 130-148).

¹³¹ Walsh, J. R., & Munster, G. J. (1980). *Documents on Australian defence and foreign policy 1968-1975*. Sydney: Authors.

¹³² Walsh, J. R., & Munster, G. J. (1982). *Secrets of state*. Sydney: Angus and Robertson.

Walsh and Munster's earlier volume was the first analysis touching on Australian nuclear policy which was able to draw conclusions about the tension between political decision-makers and their advisers within the bureaucracy.

In the same period, Camilleri's 1980 study *Australian-American relations: The web of dependence* is helpful in tracing the dynamics of this country's relations with the United States at that time, and especially for his thesis on the putative lack of any credible Australian foreign policy.¹³³

As a complement to Camilleri's general analysis, Redner and Redner's 1983 work *Anatomy of the world: The impact of the atom on Australia and the world*¹³⁴ follows the so-called "military-industrial complex" analysis of the Australia / US relationship, together with what they perceive to be Australia's unthinking foreign policy, and vulnerability to nuclear attack at the end of the Fraser Government era.

Falk's 1983 work *Taking Australia off the map*, written by a physicist and historian of science, is important for its dispassionate analysis of the practical consequences of Australia's nuclear policies, viewed from the perspective of what he calls the "Second Cold War".¹³⁵

The works of Falk and the Redners are complemented by Cawte's 1992 book *Atomic Australia 1944-1990*, which is the only substantial work on Australia's postwar uranium and nuclear energy policies.¹³⁶ As it traces the rise and fall of Australian governments' hopes of economic expansion based on abundant nuclear energy, its challenge to allegedly misconceptions about their political and economic naivety provides a backdrop to decisions of governments, in relation to the NPT, in the years leading up to 1968. However, Cawte fails to relate the question of

¹³³ Camilleri, J. (1980). *Australia-American relations: The web of dependence*. South Melbourne: Macmillan.

¹³⁴ Redner, H., & Redner, J. (1983). *Anatomy of the World: The impact of the Atom on Australia and the World*. Melbourne: Fontana. These authors, although from an academic background, have contributed nothing further of note in the present field. Their analysis will therefore be treated with some caution.

¹³⁵ Falk, J. (1983). *Taking Australia off the map: Facing the threat of nuclear war*. Ringwood: Penguin.

¹³⁶ Cawte, A. (1992). *Atomic Australia 1944-1990*. Kensington: University of New South Wales Press.

Australia's uranium export policy, and aspirations of developing a nuclear power industry, to its nuclear non-proliferation credentials. Her failure to resolve these apparently incommensurate positions is a significant omission in terms of the present study.

Finally, a significant and more recent development in this part of the literature is Reynolds' 2000 book *Australia's bid for the atomic bomb*.¹³⁷ Based on a wide range of international primary sources, and on recently released Australian archival material, the work traces Australia's search for an independent nuclear deterrent between 1943 and 1968. Its value lies in its reliance on extensive archival research, and in its focus on the primary reason behind Australia's reluctance to sign the NPT when called on to do so by America.

The above large works are complemented, especially in the period from the late 1960s onward, by small academic monographs, journal articles and working papers,¹³⁸ as well as Australian Government reports, pamphlets, background journal articles and submissions to Parliamentary Committees.¹³⁹ As stated above, they cover a wide range of issues with relevance to Australian nuclear policy, many of which are addressed by the larger works noted above, although government policy publications, such as *Current Notes on International Affairs*,¹⁴⁰ and the later equivalents *Australian Foreign Affairs Record* and *Insight* are in the latter (size-limited) category.

One of the most significant early statements of Australian government nuclear policy is that reported in *Current Notes* in March, 1968, in which the government emphasised Australia's insistence on recognition of its middle-ranking

¹³⁷ Reynolds, W. (2000). *Australia's bid for the atomic bomb*. Carlton South: Melbourne University Press.

¹³⁸ Working papers are limited almost exclusively to Series published by the Peace Research Centre, and the Strategic and Defence Studies Centre, both at the Australian National University, Canberra.

¹³⁹ A representative example is: Hayden, B. (1984). Uranium, the joint facilities, disarmament and peace. *Speech by the Minister for Foreign Affairs, Bill Hayden, MP., 29 May 1984*. Canberra: AGPS.

¹⁴⁰ Published by the former Department of External Affairs.

power status in relations with the United States.¹⁴¹ Twenty years later, a similar statement asserted, without qualification, that a nation of Australia's capacity must acknowledge that "our impact on events outside our national territory will rarely be decisive."¹⁴²

In the category of recent large articles on Australia's attempts to acquire nuclear weapons in the post-war and Cold War periods, two works stand alone. Both appeared in the US journal "*The Nonproliferation Review*". Walsh's 1997 article "Surprise down under: The secret history of Australia's nuclear ambitions"¹⁴³ was ground-breaking in that it was the first modern attempt to encapsulate the history of Australia's nuclear weapons aspirations. Hymans' 2000 article "Isotopes and identity: Australia and the nuclear weapons option, 1949-1999" contends that the history of Australia's nuclear weapons policy is one of misperceptions of security threats, based on variations in the construction of nationalist sentiments over time.¹⁴⁴

The literature specific to Australia's policies in the domain of nuclear non-proliferation follows the patterns set above, that is, a dearth of comprehensive analysis, yet with many short, narrowly focused reviews. Again, these take the form of journal articles, monographs, working papers, and (in the case of government publications) policy statements. In addition, the longer works on Australian nuclear policy, cited above, incorporate some attempt to review the role of this country within the NPT regime.

There appear to be few works directly relevant to the proposed research, in terms of Australia's role in the evolution of the NPT, and only passing reference in contemporaneous government publications to Australia's international stance (and then only in United Nations fora). Thus, Australia's negotiating position during

¹⁴¹ Australian foreign policy. (1968, March). *Current Notes on International Affairs* 39, 81-91.

¹⁴² Evans, G. (1989, April 26). Australian foreign policy: Priorities in a changing world. *Background*, 654, A1-A28, at A26.

¹⁴³ Walsh, J. (1997). Surprise down under: The secret history of Australia's nuclear ambitions. *The Nonproliferation Review* [on-line serial], 5 (1). Available WWW: <http://cns.miis.edu/pubs/npr/walsh51.htm>

¹⁴⁴ Hymans, J. E. C. (2000). Isotopes and identity: Australia and the nuclear weapons option, 1949-1999. *The Nonproliferation Review* (Spring). 1-23.

debate on the NPT at the 22nd Session of the General Assembly in May, 1968 was briefly set out in *Current Notes on International Affairs*.¹⁴⁵ In essence, and with significance for the proposed research, Australia supported the Treaty at the UN, but with the caveat that, as a non-nuclear power, the Treaty would *not* have the effect of denying it access to peaceful uses of nuclear energy.¹⁴⁶

Finally, an important template for the analytical strategy of the study is provided by Meyrowitz' 1990 study: *Prohibition of Nuclear Weapons: The Relevance of International Law*.¹⁴⁷ Meyrowitz grounds consideration of a contemporary international law issue (the question of the legality, *per se*, of nuclear weapons) on the political development of a system of legal order and rule designed to lessen the consequences of war. The work's value lies in its assertion that the rule of international law can be sufficiently enhanced as to be capable of forming a viable alternative to a realist vision of international anarchy and power modulation between states..

In summary, the Review of Literature has shown that significant deficiencies exist in the literature on the negotiation and early operation of the NPT, and in the literature relevant to Australia's role in those processes. The same is true for the range of issues on Australian nuclear policy since 1945.

Furthermore, there is a paucity of works on the international political processes between the United States and its non-NATO allies surrounding the negotiation of the NPT prior to 1968. The research aims to remedy this situation, at least in respect of US-Australia negotiations, and their implications in international law.

More generally, the Australian literature lacks a sense of balance between the contributions of the academy, NGO and government sources. The Strategic and

¹⁴⁵ Treaty on the Non-Proliferation of Nuclear Weapons. (1968, June). *Current Notes on International Affairs* 39, 234-240.

¹⁴⁶ *Ibid.* At 236.

¹⁴⁷ Meyrowitz, E. L. (1990). *Prohibition of nuclear weapons: The relevance of international law*. Dobbs Ferry, NY: Transnational Publishers.

Defence Studies Centre in the Research School of Pacific Studies at the Australian National University, established in 1966 with federal government support, remains one of the few academic body in Australia specialising in strategic analysis. Its Working Paper Series of monographs forms the majority of Australian literature of relevance to the present study.

General works on international law in an Australian context are rare, the only recent work of substance being Reicher's volume of cases and materials, statutes and treaties.¹⁴⁸

In this situation, and with new data now becoming available at the *Australian National Archives* on Australia's role in the development of the NPT, the opportunity exists to extend the current literature in a substantial and significant way.

Two studies have been identified which have relevance for the study. Both address aspects of Australia's nuclear policy development process in response to the advent of the NPT:

- Carr's 1979 Masters dissertation: *Australia and the Nuclear Question 1945-1975*.¹⁴⁹
- Tooth's 1987 Honours thesis: *Australia and the Nuclear Non-Proliferation Treaty 1968-1972*.¹⁵⁰

¹⁴⁸ Reicher, H. (Ed.). (1995). *Australian international law: Cases and materials*. North Ryde, NSW: LBC Information Services.

¹⁴⁹ Carr, M. (1979). *Australia and the Nuclear Question 1945-1975*. Unpublished Masters dissertation, University of New South Wales, Sydney. This work is a chronological account of Australia's involvement in nuclear issues in the period 1945-1975, including, in Chapter 4, a general examination of Australia and the NPT. This work has not benefited from access to the documents analysed in the study.

¹⁵⁰ Tooth, G. (1987). *Australia and the Nuclear Non-proliferation Treaty 1968-1972*. Unpublished B.A. (Honours) thesis, University of Tasmania, Hobart.

Conclusion

This Introduction has presented a summary of the context, purpose, structure, theoretical foundations and methodology of the study, together with a review of relevant literature. In doing so, it has provided a framework around which the study will build its analysis of evidence, in order to show how Australia was able to exert influence, beyond reasonable expectations, over a United States Government which was anxious to conclude a global nuclear non-proliferation treaty.

The 1968 *Nuclear Non-Proliferation Treaty* was the result of American (and Soviet) efforts, and the treaty continues as the keystone of the entire nuclear arms control regime. Its central place in the study's arguments concerning the ability of middle-powers such as Australia to have their voice heard requires, in Chapter One, an analysis of the structure, aims, deficiencies and potential effectiveness of the NPT as nuclear international law.

CHAPTER ONE

THE 1968 NUCLEAR NON-PROLIFERATION TREATY¹

Introduction: The Nature of the 1968 Nuclear Non-Proliferation Treaty

Within the framework of public international law as it has developed in the United Nations era, the emerging international law of Arms Control and Disarmament has, since the early nineteen sixties,² been engaged in a process in which its form and substance have gained increasing coherence, durability and strength.³ As discussed in the Introduction, the NPT has, since its opening for signature on 1 July 1968 (and entry into force on 5 March 1970) formed an increasingly important component of that process, as it gained growing support from States Parties which viewed it as an acceptable *compromis* modulating relations between states with and without access to nuclear technology.

The Treaty has shaped and developed the fundamental characteristics of the nuclear non-proliferation regime, with which both international legal practitioners

¹ The full text of the NPT is provided at Appendix II. [7 *ILM*. 809; 1973 *Aust. T.S.* 3].

² The first multilateral treaty aimed solely at aspects of nuclear arms control was the *Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and under Water* (the Partial Test Ban Treaty) of 5 August 1963. [43 *UNTS* 480].

³ Dahlitz, J. (1991). Introduction. In J. Dahlitz & D. Dicke (Eds.), *The international law of arms control and disarmament* (pp. 1-14). New York: United Nations Publishing Board. In contrast, Miljan Komatina (who in 1991 held the post of Secretary-General of the Conference on Disarmament in Geneva) expressed, in the same volume, a less sanguine view about the past achievements of arms control and disarmament law in meeting its primary aims. He advocated more directly organic links with other areas of international law - such as human rights and humanitarian law - as one means of enhancing outcomes for international arms control and disarmament law. At pp. 29-34. This work publishes the Proceedings of the *Symposium on the International Law of Arms Control and Disarmament* held at Geneva from 28 February to 2 March 1991, which brought together a range of senior practitioners and commentators on international law.

The compromise which resulted in the indefinite extension of the NPT in 1995, but without any alteration, has also been described as evidence of the faltering strength of the NPT and its surrounding regime. A four-step program to nuclear disarmament. (1996). *The Bulletin of the Atomic Scientists*, 52 (2), 52-54. At 55.

and other international scholars became increasingly familiar after 1989, as the Cold War subsided.⁴ That regime has been described as:

.... an integrated network of treaties and other standard-setting arrangements which provide a comprehensive framework for the behaviour of states, and international organizations and other actors, in the nuclear area. The regime includes measures that seek to remove the demand for nuclear weapons and measures that seek to restrict the supply of nuclear weapons and their related components and materials.⁵

In effect, the non-proliferation regime forms a global environment within which the international legal obligations of States Parties, established by the NPT treaty instrument, find their interpretation, application and force.

While the mechanisms which have created and authenticated this regime have been the subject of much dispute among international relations scholars, there is no doubt that the result has been the steady evolution of a matrix of “dynamic obligations” between states which extends far beyond the expectations of the Treaty’s negotiators.⁶ The conventional instrument of international law at its core continues to provide the steadying psychological elements of continuity, legitimacy

⁴ The questions surrounding the relationship between international regimes (understood as the rules guiding cooperative practices in international relations) and international law have recently been addressed by Robert Keohane in an important article. In it, he quotes Slaughter-Burley as characterising the work of political scientists on regimes as “reinventing international law in rational-choice language” or, alternatively, as claiming that *rules structure politics*. He stresses the dichotomy of interpretation evident among observers of state behaviour, distinguishing between an “instrumentalist optic” - namely the discounted impact which shared norms and their interpretation are imputed, by some, to have on state policies - and a “normative optic” which emphasises the importance of *persuasion* on the basis of norms in contemporary world politics. Keohane, R. O. (1997). International relations and international law: Two optics. *Harvard International Law Journal*, 38 (2), 487-502, at 488 ff.

⁵ Simpson, J. & Howlett, D. (1994). The NPT Renewal Conference. *International Security*, 19 (1), 41-71. At 43, 44. These authors refer, on the demand side, to measures such as the NPT itself, the IAEA safeguards system, full nuclear disarmament, and an international non-proliferation norm. On the supply side of the nuclear equation, they cite nuclear export controls (such as that established by the Nuclear Suppliers Group (NSG) of nuclear materials exporting countries) and restrictions on the dissemination of advanced nuclear weapon technology.

⁶ For contrasting analyses of the mechanisms which create and cohere regimes of agreements and understandings surrounding multilateral treaty instruments, and the practical application of their terms, cf: Setear, J. K. (1996). An iterative perspective on treaties: A synthesis of international relations theory and international law. 37 *Harv. Int'l. L. J.* 139; and Smith, E. M. (1991). Understanding dynamic obligations: Arms control agreements. 64 *S. Cal. L. Rev.* 1549.

For an analysis of the roles of trust, and of “shaming” in the behaviour of states in compliance with international norms, regimes and regulations, see: Rengger, N. (1997). The ethics of trust in world politics. *International Affairs*, 73 (3), 469-487.

and assurance without which the principles of nuclear non-proliferation it enunciates would be swiftly lost.

The period of over forty years which has elapsed since the earliest moves began in the five member London Subcommittee of the United Nations Disarmament Commission towards negotiating a partial nuclear disarmament and non-proliferation plan has seen significant legal, geopolitical and social change, and redefinition, on a global scale.⁷ The extent and rate of that change has, in turn, exerted its influence on the status and structure of international law generally, and, more specifically, on the expectations placed on it by both individuals and states. From a perspective far wider than nuclear disarmament itself, international Arms Control and Disarmament law is a vivid exemplar of this trend.

The urgent need felt by states in many parts of the world for economic, social and political reconstruction in the immediate postwar years induced competition between ideological and political alliances which reified swiftly into the armed camps of West and East, and into the mutual animus manifest, in varying degree, during the Cold War era. Despite this, efforts aimed both at general disarmament, and the regulation of armaments, began in 1946 at multilateral and bilateral governmental levels, at the United Nations, and in many non-governmental fora.⁸

In the nuclear arena, they have continued unabated since that time, and many arms control negotiations have acknowledged over the past thirty years the cardinal

⁷ This first structured, multilateral step along the nuclear non-proliferation road was taken on 29 August 1957. The “package” proposal submitted by the United States, the United Kingdom, France, and Canada called for a fissionable materials production “cutoff”, transfer of such materials from weapons stocks to peaceful uses, a nuclear weapons test ban, safeguards against surprise attack, a ban on the transfer or acceptance between states of nuclear weapons (except for defensive purposes), as well as conventional disarmament measures. The proposal was rejected by the Soviet Union. *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At pp. ix, 3. This volume provides an extensive and authoritative historical review of the public international negotiations leading to the 1968 *Nuclear Non-Proliferation Treaty* (NPT). See also: *Keesing’s research report: Disarmament: Negotiations and treaties 1946-1971*. (1972). New York: Charles Scribner’s Sons. At pp. 137-168.

⁸ The Charter of the United Nations itself refers, in Articles 11 (1) and 26, to the questions of disarmament and the regulation of armaments. See Appendix II of this thesis. Resolution 1 (I) of the First Session of the United Nations General Assembly on 24 January 1946 is the earliest example of regular General Assembly resolutions addressing questions of non-proliferation of weapons of mass destruction, arms control and disarmament. Dahlitz, J. (1983). *Nuclear arms control with effective international agreements*. Melbourne: McPhee Gribble. At p.11.

value and central role of the NPT regime as both a moderating influence over potential nuclear proliferators, and the keystone of global arms control.⁹

The Aims of the NPT

The NPT was opened for signature on 1 July 1968 at Washington, London and Moscow. It entered into force on 5 March 1970, following the deposit of the fortieth instrument of ratification with the three Depository Governments - the United States, the United Kingdom and the Soviet Union (each of which had themselves ratified the Treaty).¹⁰ To date, 187 states have acceded to its terms.¹¹

Its importance as an arms control and disarmament measure is surpassed only by the long-sought but (so far) unobtainable goal of a multilateral Nuclear Weapons Convention constructed along the lines of the Chemical and Biological Weapons Conventions banning the development, production, stockpiling and use of these other forms of massively destructive weapons.

Its primary objective was - and is - to establish in international law an express prohibition against the acquisition of nuclear weapons by all States Parties which had not yet crossed the nuclear weapon threshold. Thus, Article IX of the Treaty created a class of nuclear weapon states defined as those which “[had]

⁹ Michael Reiss has produced a series of country case studies in which he analyses the processes and mechanisms by which some states, such as South Africa, Brazil and Ukraine, have decided to discontinue or freeze their nuclear weapons programmes. Although many factors influencing policy decisions are evident across states, he nevertheless makes the point, in Chapter 1, that long-held assumptions about the inevitability of global nuclear proliferation may be challenged in the context of rapidly changing geopolitical realities. Reiss, M. (1995). *Bridled ambition: Why countries constrain their nuclear capabilities*. Washington, DC: The Woodrow Wilson Center Press.

It is important to distinguish between *arms control* and *disarmament*. The former has been defined as “restraint exercised upon armaments policy, whether in respect of the level of armaments, their character, deployment, or use”; the latter as “the reduction or abolition of armaments”. Ball, D., & Mack, A. (1987). Preface. In D. Ball & A. Mack (Eds.), *The future of arms control* (pp. xi-xiii). Rushcutters Bay: Australian National University Press. At p. xi.

¹⁰ *The United Nations and nuclear non-proliferation: Blue Book series (Vol. III)*. (1995). New York: Department of Public Information, United Nations. At p. 6, paragraph 13. These arrangements are in accordance with Article IX, Paragraphs 2 and 3, of the NPT.

¹¹ Downer, A. (2000). *NPT Review Conference: Speech by the Minister for Foreign Affairs* [on-line]. Available WWW: http://www.dfat.gov.au/media/speeches/foreign/00425_npt.html.

manufactured *and* exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967.”¹² It thereby distinguished a class of non-nuclear weapon states: those which, as Parties to the Treaty, were not permitted to gain and maintain sovereign control over nuclear explosive devices of any type.

From a more extensive perspective, the Treaty’s aims were generated by, and were reflective of, the relational dynamics inherent in the global geopolitical, security, and international law regimes which had developed during the twenty-three years since the end of the Second World War.¹³ One of the turning points in that process was UN Resolution 2028 (XX), formulated by the First (Disarmament and International Security) Committee of the United Nations General Assembly, and passed by the Assembly in plenary session on 23 November 1965.

The five principles it established formed the guiding doctrine under which the terms of the NPT were negotiated, and were themselves the result of seven years of discussions in the First Committee of the Assembly, in the Eighteen Nation Disarmament Committee in Geneva, and in United Nations Disarmament Commission debates.¹⁴ The principles on which an international treaty to prevent nuclear weapon proliferation should be based were:

¹²Article IX, Paragraph 3 (emphasis added).

¹³Makinda provides a thorough critique of the contribution of Hedley Bull’s conception of the broad scope of “security” (from a Realist perspective which encompasses the rights and responsibilities of both states and individuals) to an understanding of the development of traditional international security beyond state territorial integrity and political independence, towards “collective security” which focused mainly on the needs, rights and duties of individuals. The importance of Bull’s ideas lies in their emphasis on the political complexities of each state’s strategy for securing its own political independence. Another theme of Bull’s work, according to Makinda, is the ability of the UN to deal with common threats to international order - as the UN-endorsed NPT sought to do. Makinda, S. (1997). Hedley Bull and post-Cold War security. In G. Crowder, H. Manning, D.S. Mathieson, A. Parkin, & L. Seabrook (Eds.), *Australasian Political Studies 1997: Proceedings of the 1997 ARSA Conference, Volume 2* (pp. 653-668). Adelaide: Flinders University Department of Politics. At pp. 659 *et seq.*

¹⁴Many studies trace the evolution of nuclear non-proliferation efforts, from their inception up to the entry into force of the NPT in 1970. The most comprehensive work is Shaker’s 1980 three volume study of the origin and implementation of the NPT during the period 1959-1979.

The earliest United Nations-based moves came from proposals by the Irish Delegation to the United Nations in the years 1958 to 1961. These proposals sought a Resolution in the UN General Assembly calling for the “prevention of the wider dissemination of nuclear weapons” and an “international agreement” prohibiting “control” of nuclear weapons to any state not already in possession of them (and prohibiting manufacture of nuclear weapons by those states). The UNGA adopted Resolution 1380 (XIV) on 20 November 1959, encompassing the spirit of the Irish proposals, and recognising, for the first time at the highest level of the United Nations, the danger inherent in any form of nuclear weapons proliferation. Shaker, M. (1980). *The Nuclear Non-proliferation Treaty: Origin and implementation 1959-1979 (Volume 1)*. London: Oceana. At pp. 24-33.

- Avoidance of any loopholes which might allow a nuclear or non-nuclear Power to proliferate, directly or indirectly, nuclear weapons in any form.
- Embodiment of an acceptable balance of mutual obligations and responsibilities between the nuclear and non-nuclear Powers.
- Incorporation of moves towards general and complete disarmament, with emphasis upon nuclear disarmament.
- Agreement on acceptable and workable provisions to ensure the effectiveness of the treaty.
- Avoidance of provisions adverse to the establishment of regional treaties aimed at eradicating nuclear weapons from defined territories.¹⁵

The Resolution requested the Eighteen Nation Disarmament Committee in Geneva to submit a report on the results of its work on a non-proliferation treaty to the Assembly at an early date. It is this UN General Assembly Resolution which formed the substantive impulse behind negotiations both within the ENDC itself, and between the eventual co-sponsors of the NPT, the United States and the Soviet Union.

By late 1964, the five Permanent Members of the Security Council of the United Nations had each become self-declared nuclear weapon states.¹⁶ One year previously, when announcing that agreement had been reached on the terms of the 1963 *Partial Test Ban Treaty*,¹⁷ US President John F. Kennedy presented a vision of the future in which efforts to curtail nuclear proliferation had failed. He said:

¹⁵ *Infra*. At Note 18, p. 240.

¹⁶From 1946 to 1971, the Chinese seat at the United Nations Security Council was occupied by the Republic of China (Taiwan). Taiwan was then replaced by the People's Republic of China. The PRC had detonated an atomic device at Lop Nor, Sinkiang Province on 16 October, 1964. It became the fifth declared nuclear weapon state after the United States, the Soviet Union, the United Kingdom and France. *Supra*, at Note 5. At pp. 22, 23.

¹⁷Known formally as the 1963 *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water* [480 UNTS 43].

I ask you to stop and think for a moment what it would mean to have nuclear weapons in so many hands, in the hands of countries large and small, stable and unstable, responsible and irresponsible, scattered throughout the world. There would be no rest for anyone then, no stability, no real security and no chance of effective disarmament. There would only be the increased chance of accidental war and an increased necessity for the great powers to involve themselves in what would otherwise be local conflicts.¹⁸

President Kennedy's vision is one of the clearest, most succinct and prescient articulations of the primary rationale of the NPT at its inception some five years later.

The Provisions of the NPT : A Critique¹⁹

What, then, were the substantive provisions of the NPT text presented to the UN General Assembly on 12 June 1968, and to what extent did they reflect recognition of the five principles developed in Resolution 2288 (XX)?²⁰

First, the provisions of Article I, and the reciprocal provisions of Article II appear capable of interpretation which acts contrary to the first principle of Resolution 2288 (XX). Nuclear weapon states retain the ability under the terms of Article I to place nuclear weapons on the territory of non-nuclear weapon states so long as they retain control and ownership over them.

While nuclear weapon states may not, under Article I, transfer nuclear explosive devices, or control over them, to non-nuclear weapon states, and may not

¹⁸Fisher, A. S. (1970). Global dimensions. In B. Boskey & M. Willrich (Eds.), *Nuclear proliferation: Prospects for control*. New York: University Press of Cambridge, Mass. At p.3.

¹⁹The text of the Treaty is provided at Appendix II.

²⁰*Ibid*. On that date the General Assembly voted by 95 to 4, with 21 abstentions to "commend" the Treaty. Although the four dissenters were minor states, the abstainers included France, and "threshold states" such as Brazil and India, reflecting some measure of the misgiving these (at that time) potential nuclear weapon states felt about the collaboration of the United States and the Soviet Union in resolving the final text of the treaty. It may be noted that this study has, as a primary aim, the modification of this simple analysis by the introduction of elements of influence exerted by middle-ranking states such as Australia.

“assist, encourage or induce” such states to manufacture or otherwise acquire nuclear devices, they are able to retain them *in their own arsenals* within the borders of non-nuclear states. In this way, *de facto* proliferation of nuclear weapons can be achieved without breaching the terms of the most important provision of the NPT - the obligation which nuclear weapon states undertake under Article I to refrain from transferring nuclear weapons *or control over them* to any recipient whatsoever.²¹

From the non-nuclear states’ point of view, their reciprocal obligation under Article II of the Treaty not to acquire or manufacture nuclear weapons does not restrict their ability to accept defensive placement of nuclear weapons, within their own national boundaries, while under the control of any nuclear weapon state ally.²²

The importance of this deficiency becomes clear from the example of the positioning of nuclear weapons by the United States on the territory of non-nuclear weapon states of the North Atlantic Treaty Organisation. The degree to which states such as the Netherlands, Belgium and Italy exercise “control” over United States nuclear weapons within their borders is a crucial determinant of America’s compliance with the terms of Article I of the NPT.²³

Second, Article III directly addresses the fourth principle of Resolution 2028 (XX), which seeks “acceptable and workable provisions to ensure the effectiveness of the treaty.” By establishing the obligation of non-nuclear weapon states to accept safeguards, imposed by the International Atomic Energy Authority (IAEA), against the diversion of peaceful nuclear energy technology to weapons manufacture, it establishes a transparent process of verification of compliance with the terms of the Treaty.²⁴ While Article III is a vital means of providing assurance for each State

²¹For the terms of Articles I and II of the NPT, see Appendix II.

²²*Ibid.*

²³Willrich, M. (1969). *Non-Proliferation Treaty: Framework for nuclear arms control*. Charlottesville, VA: The Michie Company. At pp. 67-98.

Singh and McWhinney have suggested that the omission from the NPT of a prohibition against nuclear weapons transfers between alliance members is the result of the United States’ renunciation of the proposed European Multilateral Force (MLF) arrangements during 1966 and 1967. This, they suggest, resulted in the absence of any Soviet objection to the establishment of a framework of shared responsibility for nuclear planning and decision-making within NATO, manifested in its Nuclear Defence Affairs Committee established in December 1966. Singh, N., & McWhinney, E. (1989). *Nuclear weapons and contemporary international law* (rev. ed.). Dordrecht: Martinus Nijhoff.

²⁴Article III also provides, in paragraph 2, for the safeguard of nuclear materials and equipment transferred to non-nuclear weapon states for peaceful purposes by any State Party. Paragraph 3

Party that all others are, in fact, complying with their treaty obligations, this potentially universal confidence-building measure is moderated by the fact that there is no concomitant obligation on the nuclear weapon states to submit their own nuclear activities to IAEA scrutiny.²⁵

Third, Articles IV and V can be regarded as directed towards the second guiding principle, that of an acceptable balance of mutual responsibilities and obligations between nuclear and non-nuclear weapon states. By advocating the greatest possible sharing of peaceful nuclear benefits through exchange of equipment, materials and information, and through the (now redundant and discredited) notion of the peaceful application of nuclear explosions, the treaty seeks the greatest degree of reciprocity obtainable in an overtly discriminatory multilateral agreement.²⁶

Fourth, and most controversially in the history of the Treaty, Article VI attempts to address the third principle of “general and complete disarmament and, more particularly, nuclear disarmament.” Its call for pursuit of “negotiations in good

provides for the avoidance of interference with the development of peaceful uses of nuclear energy, while paragraph 4 provides for the early conclusion of bilateral safeguard agreements between States Parties and the IAEA in accordance with its Statute (at Appendix II).

²⁵The United States, nevertheless, declared in 1967 that its nuclear sites *which are not of vital national interest* would be subject to inspection under the terms of the IAEA Statute. *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At p. 177.

The US has taken some steps towards bring its nuclear regulations into line with IAEA practices in respect of the physical protection of nuclear materials. In 1978 its Nuclear Non-Proliferation Act made adequate physical protection a condition of nuclear export licenses and agreements for cooperation. *Nuclear arms control: Background and issues*. (1985). Washington, D.C.: Committee on International Security and Arms Control, National Academy of Sciences. At p. 250.

²⁶The security guarantees which were made by the United States, the United Kingdom and the Soviet Union to non-nuclear weapon states which are Party to the NPT, and the parallel Declarations appended to Security Council Resolution 255 of 19 June 1968 were also made in the spirit of the principle of mutual responsibility. They were reinforced by positive and negative Security Declarations made by (then) all five declared nuclear weapon states at the conclusion of the 1995 New York Conference on the Indefinite Extension of the Nuclear Non-proliferation Treaty. These states will, according to their Declaration:

(a) “.... provide or support immediate assistance, in accordance with the *Charter*, to any non-nuclear weapon State Party to the *Treaty on the Non-Proliferation of Nuclear Weapons* that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used” [U.N. Docs. S/1995/261-265], and

(b) “.... will not use nuclear weapons against non-nuclear weapon States Parties to the *Treaty on the Non-Proliferation of Nuclear Weapons* except in the case of an invasion or any other attack on [the United States], its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear weapon State in association or alliance with a nuclear weapon State” [U.N. Doc. A/50/153 (1995)].

faith on effective measures relating to cessation of the nuclear arms race at an early date,” and to nuclear disarmament combined with “a treaty on general and complete disarmament under strict and effective international control” has been widely regarded by non-nuclear weapon states as lacking credibility, both during and following the Cold War period.²⁷ The NPT has been far more successful in limiting so-called “horizontal” proliferation (the spread of nuclear weapons to previously non-nuclear weapon states) than it has in limiting the “vertical” proliferation evident in the nuclear overkill capacity of the declared nuclear weapon states. This continues to be the case at the beginning of the new century.²⁸

Fifth, Article VII expressly acknowledges the final principle of UN General Assembly Resolution 2028 (XX). Using language similar to that used in the Resolution, it avoids any possible interference with the ability of groups of states to conclude regional agreements which totally ban nuclear weapons from their collective territories. The negotiation of the three regional “nuclear-free zone” treaties is evidence of the success of this Article.²⁹

²⁷One example of such sentiment is the observation by Feld that “The breakdown of nuclear arms control negotiations is generally taken as *prima facie* evidence of the failure of the superpowers to live up to their end of [their Article VI] obligation” Feld, B. (1984). Public opinion and arms control. In J. Rotblat & S. Hellman (Eds.), *Nuclear strategy and world security: Annals of Pugwash 1984* (pp. 343-347). Houndmills: Macmillan. At p. 346.

In a general sense, much progress in nuclear arms reduction efforts has accompanied the end of the Cold War, although the nuclear weapon reduction targets set by the START II Treaty between the United States and (now) Russia is limited by the capacity of each to destroy nuclear warheads (estimated at between 1,500 and 2,000 each year). It has been estimated that those target levels will not be reached until 2010 at the earliest, seven years after the treaty is expected to come into force. Clements, K. P. (1994/95). Imagining a world without nuclear weapons: Moving beyond the Nuclear Non-Proliferation Treaty. *Current Affairs Bulletin*, (1994-1995), 4-10. At p. 7.

²⁸In 1984, at the height of the United States Reagan Administration’s military spending-based challenge to the Soviet Union, the United States and the Soviet Union were estimated to have a combined nuclear arsenal with explosive power equal to four tonnes of TNT for each inhabitant of the Earth. Ahmad, I. (1984). Impact of the global arms race on prospects for development. In J. Rotblat & S. Hellman (Eds.), *Nuclear strategy and world security: Annals of Pugwash 1984* (pp. 328-340). Houndmills: Macmillan. At p. 328.

²⁹The three regional treaties which have now been concluded, establishing nuclear-free zones in wide regional areas, are: the 1967 *Treaty of Tlatelolco* [634 UNTS 231] (Latin America and the Caribbean); the 1985 *Treaty of Rarotonga* [24 ILM 1440 (1986)] (the South Pacific); and the 1996 *Treaty of Pelindaba* [Opened for signature on 11 April 1996 at Cairo, Egypt: UN Doc. A/RES/50/78 (1995)] (Africa).

Several proposals have been made in recent years, under the aegis of the United Nations, calling for nuclear free zones to be established in the Middle East and South Asia. Goldblat, J. (1994). *Arms control: A guide to negotiations and agreements*. London: Sage. At pp. 157, 158.

Sixth, the amendment and review procedures of the NPT (contained in Article VIII) is an attempt to introduce a measure of flexibility into the operation of the Treaty through explicit mechanisms for revising its terms. In so doing, it seeks to sustain the Treaty's effectiveness, while ensuring its continued acceptability and "workability" through rigorous voting requirements - as expressed in the fourth principle incorporated in UNGA Resolution 2028 (XX) noted above. It may be observed, however, that no amendment to the treaty has ever been successfully proposed or accepted.³⁰

Finally, it can be argued that Article X again creates a structural loop-hole for States Parties seeking to avoid its strictures. The ability of states to withdraw from the Treaty pursuant to the express provisions of Article X (with only three months notice, and on the basis of "extraordinary events ... [which have] jeopardized [its] supreme interests") is not a feature calculated to encourage the durability of continued accession.³¹ However, the objective customary rule in international law *rebus sic stantibus* ("things remaining as they are") conditions the continuing adherence of States Parties to all treaties. Thus, a fundamental change of circumstances surrounding the operation of a treaty is sufficient grounds, in customary law, for a State Party to withdraw at any time. To this extent, the withdrawal provisions of Article X may be considered redundant.³²

³⁰Article VIII requires any amendment to be approved by a majority of States Parties, that majority to include all five declared nuclear weapon states, and those states which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency.

³¹The success of an NPT devoid of such an "escape" clause, when compared to the actual treaty, is open to conjecture. Many states may not have been prepared to accede to the NPT without the assurance of renunciation afforded by Article X. In practice, the threat of withdrawal may result in the application of extreme political and economic pressures by other States Parties on the recalcitrant state. The decision of the Democratic People's Republic of Korea (North Korea) to withdraw from the NPT, given to the UN Security Council on 12 March 1993, resulted in severe political and economic pressures being placed on it, both unilaterally by the United States, and in the fora of the UN. The result was the Agreed Framework between the US and North Korea of 21 October 1994, in which North Korea stated that it would remain a Party to the NPT, and allow implementation of its safeguards agreement, negotiated with the IAEA under the terms of the Treaty. *1996 Inventory of international nonproliferation organizations and regimes* (1996). Monterey, CA: Center for Nonproliferation Studies. [on-line]. Available WWW: <http://cns.miis.edu/cns/inventory96/globalorg.html>.

³²The customary rule on treaty withdrawal was codified in the 1969 *Vienna Convention on the Law of Treaties* which, although it does not have retroactive effect (pursuant to Article 4 of the Convention) nevertheless serves to strongly reinforce and advance the customary international law on treaties, of which the rule *rebus sic stantibus* forms a part [1155 UNTS 331; 8 ILM 679 (1969)].

From a more general perspective, two important and unavoidable structural weaknesses for non-proliferation efforts combine to undermine the *prima facie* effectiveness of the NPT which, in retrospect, has succeeded in its aims far better than their presence suggests.

First, the possession by any state of peacefully-directed nuclear technology (primarily for large-scale electrical power generation) immediately confers on it a latent *capacity* covertly to redirect a portion of its nuclear power programme towards weapons manufacture. Such a capability is a direct challenge to any pragmatic expectation of an effective treaty, a principle which was seen by Resolution 2028 as a fundamental prerequisite to successful conclusion of the NPT.

A state's success in this endeavour will depend on a number of factors, such as its economic, financial and industrial capacity, and the availability to it of all necessary components of the nuclear fuel cycle. Nevertheless, once acquired, nuclear technology and expertise cannot readily or easily be removed or eradicated. In these circumstances, the only substantial barrier preventing conversion of nuclear power generating technology into weapons of war, as Article III of the NPT seeks to do, is a state's obligations under its agreements with the International Atomic Energy Agency (IAEA).³³

The ability of the IAEA, the primary independent nuclear regulatory authority within the United Nations system, successfully to discharge its safeguard responsibilities under the NPT is, of course, dependent on the cooperation of all subject states. With limited inspection resources, and no specifically coercive function, the Agency's regulatory success has been mixed. Although a programme to

³³Article III, Paragraph 4 of the NPT requires States Parties to the NPT to conclude agreements, either individually or together with other states, with the IAEA in accordance with its Statute (1957, IAEA, Vienna). Article III of the Statute of the IAEA establishes the agency's main functions thus:

- (a) Assist research, development and practical application of atomic energy for peaceful purposes.
- (b) Make provision for relevant materials, services, equipment and facilities, with due consideration for the needs of the underdeveloped areas of the world.
- (c) Foster the exchange of scientific and technical information and to encourage the training of experts in the field of peaceful uses of atomic energy.
- (d) Administer safeguards designed to ensure that relevant materials, equipment and information are not used in such a way as to further any military purpose.
- (e) Establish standard of safety for the protection of health and the minimisation of danger to life and property.

See Appendix III. Goldblat, J. (1994). *Arms control: A guide to negotiations and agreements*. London: Sage. At p. 33.

strengthen the efficiency and effectiveness of full-scope safeguards is now in place, the IAEA's most prominent failure has been its inability even to *detect* Iraq's large-scale nuclear weapons development programme in the period leading up to the 1991 Gulf War.³⁴

Second, the NPT does nothing to prohibit a state from developing the capacity to produce and stockpile the fissionable materials needed for nuclear weapons from its own resources, as a by-product of its own, indigenously developed nuclear power generation industry or covert military nuclear programme. Having accumulated stocks of plutonium or enriched uranium without outside assistance and given notice of withdrawal pursuant to Article X, paragraph 1 of the treaty, such a non-nuclear weapon State Party to the Treaty (notwithstanding the political and economic consequences of its actions) need never be more than three months away from legal and credible nuclear weapon status.³⁵

In summary, the NPT can be characterised as only partially successful in meeting the principles laid down in United Nations General Assembly Resolution 2028 (XX). While it establishes a framework of mutual responsibilities and obligations, it does so on a discriminatory basis. Then, having established the primacy of nuclear

³⁴The programme, known as "Programme 93 + 2" was instituted by the Board of Governors of the IAEA in its June, 1993 session. *1996 inventory of international nonproliferation organizations and regimes*. (1996). Monterey Center for nonproliferation studies. [on-line]. Available WWW: <http://cns.miis.edu/cns/inventory96/globalorg.html>.

Although Iraq accepted IAEA inspection of its *declared* nuclear sites prior to the war, the Agency's systems and procedures failed to reveal the existence of a large and advanced covert nuclear weapons programme. Western allied intelligence and surveillance resources fared no better. Rathjens, G. (1998). Nuclear proliferation following the NPT extension. In R.G.C. Thomas (Ed.), *The nuclear non-proliferation regime: Prospects for the 21st century*. (pp. 25-40). Houndmills: Macmillan. At p. 29.

³⁵*Ibid.* At pp. 26, 27. The ability of states to gather the technical *capacity* and fissionable materials necessary to assemble nuclear devices, without actually producing them, was less widespread in 1968 than it is today. Uranium highly enriched in its fissionable isotope U235, and metallic plutonium are the key nuclear fuel materials used for constructing explosive nuclear devices. Japan is one example of a state which has acquired significant stocks of high-grade plutonium beyond its requirements for energy generation. Its large-scale imports of re-processed spent reactor fuel contain sufficient fissionable material (grading between 60% and 80% Pu239) to be usable in explosive devices, and they can be readily purified, if necessary, to even higher grades. This has led to speculation about Japan's possible preparation for nuclear weapons production, which it could accomplish, from a technical point of view, within a short time frame. Imai, R. (1998). Japan's nuclear policy: Reflections on the immediate past, prognosis for the 21st century. In R.G.C. Thomas (Ed.), *The nuclear non-proliferation regime: Prospects for the 21st century* (pp. 181-206). Houndmills: Macmillan. At pp. 194-198.

weapon states, it confers on them the ability legally to position and control nuclear weapons on the territory of non-nuclear allies.

Moreover, its efficacy is, in too large part, dependent on the good faith of States Parties to its terms (as, of course, is the case for all conventional international law instruments). Nevertheless, over-dependence on good faith in matters of nuclear weapons proliferation is an extremely dangerous path, especially as more states (and even sub-state and non-state actors) gather the expertise necessary for independent nuclear weapons development.

Again, while the NPT contains provision for review and amendment, the five yearly Review Conferences established under Article VIII, paragraph 3, and the 1995 Review and Extension Conference foreshadowed in Article X, paragraph 2, have not resulted in amendments of any kind.³⁶

Finally, the goal of total and rapid nuclear disarmament (to be completed through a Nuclear Weapon Convention similar to the 1993 *Chemical Weapons Convention*)³⁷ called for in Article VI has manifestly failed to be achieved.

In general terms, however - and notwithstanding its deficiencies - the NPT still carries the attribute and cachet of durability. With the burden of a text unchanged over thirty-three years of rapid change, it continues as the most important international law instrument (and as the progenitor of a political regime of understandings and accommodations) now available to the international community to enhance its anti-proliferation efforts. Its most important single virtue is the fact that no alternative universal, and demonstrably sustainable mechanism exists, or is likely to be developed, in the foreseeable future.

³⁶The need for amendments to the NPT in light of the many diverse and fundamental geopolitical and technological changes which have occurred since 1968 is discussed below.

³⁷1993 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*. [Misc. 21 (1993) Cm. 2331; 32 ILM 800].

The NPT and the Role of Perceptions

Since 1968, both the provisions of the Treaty itself, and the broad and profound changes evident in the institutions and structures of inter-state relationships, have exerted significant influence over perceptions of its aims and objectives, its successes and failures, and the need for amendments to its provisions.

Two contrasting models have been proposed as alternative methods of arms control treaty evolution.³⁸ This dichotomy characterises as “explicit” the influence of the terms of the Treaty itself on expectations held for it by states and other international legal persons (such as inter-governmental and non-governmental organisations like the Nuclear Suppliers Group and the Stockholm International Peace Research Institute).

By contrast, “implicit” methods of treaty evolution emphasise interpretations of the instrument by States Parties, based on their own understanding of its terms, and their development of subsequent practice based on changing national interests.³⁹ The provisions of the NPT which fit the former category are those provisions which:

- (a) Call for an early cessation of the nuclear arms race, and negotiation of a general and complete disarmament treaty under strict and effective international control (Article VI).
- (b) Require the holding of Review and Extension Conferences (Articles VIII, paragraph 3 and X, paragraph 2).
- (c) Specify an arrangement for amendments to the Treaty (Article VIII, paragraphs 1 and 2).
- (d) Specify the terms under which any State Party may withdraw from the Treaty (Article X, paragraph 1).⁴⁰

³⁸*Op. cit.* At Note 3. Ipsen, K.: Symposium Paper: *Explicit methods of arms control treaty evolution*. At pp. 76 ff.

³⁹*Ibid.*

⁴⁰*Ibid.*

Each exerts “explicit” influence on the ways in which perceptions of the Treaty’s aims have developed since its inception. As both substantive and procedural rules, they state the methods by which peaceful change may be effected within the legal order they inhabit.⁴¹ By creating an operative framework for the NPT, these provisions lay out for States Parties the ways in which they can expect to contribute to its incremental change and development, as deficiencies and shortcomings become apparent.

They also provide assurance to the non-nuclear weapon states, and especially to the many of them which were not allied to major power blocs (or possessed little influence over the major Powers) that change was possible in the face of opposition from the five declared nuclear weapon states.

These arrangements, though they may have been incontrovertible and indispensable in 1968, later became more questionable in light of subsequent experience of their operation. They were increasingly seen as tending more to constrain, rather than promote, the aims of the Treaty.⁴²

Thus, the provisions of Article VI are now viewed less as a firm commitment by the nuclear weapon states to all other States Parties, and more as a concession whose deliverance continues as a distant normative element of the non-proliferation regime. Again, experience with the Review and Extension Conference requirements of Articles VIII and X has redefined their purposes, and expectations for their achievements, in ways differing significantly from those originally envisaged.

It is this more “implicit” mode of evolution which has come to dominate the practical operation of the NPT, and to have driven the development of the nuclear non-proliferation regime which surrounds it. Moreover, it has complemented the emphasis placed by States Parties on the interpretation of the terms of a multilateral treaty which was to prove impossible to formally amend.

⁴¹The relationship between procedural and substantive rules in a system of rules (or laws) is addressed by Hart, who criticises the international system for its emphasis on substantive “primary” rules, to the detriment of “secondary” procedural rules which allow a law to be modified through subsequent legislation and the decisions of courts. Hart, H.L.A. (1961). *The concept of law*. Oxford: OUP. At p. 209.

⁴²*Ibid.* The refusal of States Parties to the NPT to allow the People’s Democratic Republic of Korea to withdraw from the treaty pursuant to Article X (1) is one example of the evolution of an explicit provision from *de jure* substance to *de facto* irrelevance. At Note 31. A second is the fact that the restrictive and complex amendment provisions of Article VIII (1) and (2) have never been used.

Three distinct phases, at least in respect of global geopolitical evolution, can be identified as discrete components in an understanding of the development of expectations surrounding the operation of the NPT.⁴³ These are:

- The era of “*Detente*” in East-West relations from the mid-1960s to the mid-1970s, distinguished by pragmatic political accommodation, and by a degree of diplomatic compromise.
- The so-called “Second Cold War” period of the Reagan Presidency during the 1980s, characterised by neo-realist considerations of national interest, and burgeoning defence spending.
- The post-Cold-War decade of rapid change from 1989.⁴⁴

Each period has seen a broad re-evaluation of the role of international law in the field of arms control, and in particular of one of its core conventional components, the NPT. This is not to suggest, however, that the fundamental precepts and practices of international law (such as the maxim *pacta sunt servanda*, and the principles of state sovereignty and immunity) are in some way contingent on the tenets of *Realpolitik*. Rather, it is to contend that, especially in those areas of international concern which are not “regulat[ed] by adequate and predictable rules,”⁴⁵ such as international security, peace and war, wide consensus among the

⁴³ The expectations placed on the operation of the NPT, and the ways in which they have altered over time, is the central variable in any analysis of the development of the nuclear non-proliferation regime.

It may be noted that the total number of nuclear warheads in the possession of all nuclear powers rose from 6,737 in 1968 to 31,718 in 1990, at the conclusion of the Cold War. This is a crude, yet indisputable measure of the limited effectiveness of the NPT as an instrument in international law. Paul, T.V. (1998). The NPT and power transitions in the international system. In R.G.C. Thomas (Ed.), *The nuclear non-proliferation regime: Prospects for the 21st century* (pp. 56-74). Houndmills: Macmillan. At p. 58.

⁴⁴ Sanders provides an overview of the development of the relations of the United States and the Soviet Union in regard to nuclear proliferation “from open hostility through grudging interaction to active cooperation.” Sanders, B. (1990). The Treaty on the Non-proliferation of Nuclear Weapons and the relations between the superpowers. In M. P. Fry, N. P. Keatinge, & J. Rotblat (Eds.), *Nuclear non-proliferation and the Non-Proliferation Treaty* (pp. 80-90). Berlin: Springer-Verlag.

Clements broadly analyses the nature of nuclear non-proliferation, from a global perspective, at the mid-point of the nineteen-nineties. *Op. cit.* At Note 27.

⁴⁵ Dahlitz, J. (1983). *Nuclear arms control with effective international agreements*. Melbourne:

society of states about the *relevance* and *efficacy* of aspects of international law and its application to problems will always be difficult.⁴⁶

That this is so becomes more easily understood in view of the particular nature of arms control treaties, namely their invocation of limitations on the right of states to arm themselves, and thus the ability of such treaties to “strike at the very existence of states.”⁴⁷

“Detente”

Examining more closely the periodisation proposed above, the early “Detente” period of operation of the NPT corresponds to that referred to by Akashi as “the ‘productive period’ ” between 1967 and 1974, when a number of multilateral and bilateral arms control Agreements and Treaties were negotiated.⁴⁸

The NPT can be viewed as a component of the increasing scope and focus of arms control measures which characterises this period. In particular, the European

McPhee Gribble. At Chapter 5, p. 90.

⁴⁶*Ibid.* At pp 90, 99. Dahlitz points to the dichotomy evident in the “adequate” response of international law to less controversial areas of international concern (such as maritime law, civil aviation, diplomatic law, communications, and commercial transactions) when compared to its performance in respect of “international security, peace and war.”

⁴⁷Lysen, G. (1990). *The international regulation of armaments: The law of disarmament*. Uppsala: Iustus Forlag. At p. 145.

⁴⁸*Supra.* At Note 3. Yosushi Akashi, in 1991 the United Nations Under-Secretary-General for Disarmament Affairs, referred, in his Address to the Formal Plenary Session of the *Symposium*, to agreements which were focused on:

(a) Preventing the acquisition of nuclear weapons and other mass destruction capabilities which did not yet exist, and

(b) Preventing the deployment of mass destruction weapons where they had not yet been deployed..
At p. 17.

Among the most significant arms control measures during this period (extended back to 1963) are:

(i) The 1963 *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water* [480 UNTS 43].

(ii) The 1972 *Treaty on the Limitation of Anti-Ballistic Missile Systems* [944 UNTS 13].

(iii) The 1972 *Treaty on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* [1015 UNTS 163].

(iv) The 1972 *SALT I Interim Agreement*.

For an early, yet pessimistic, appreciation of the ability of the NPT to discourage nuclear proliferation see: Quester, G. H. (1973). *The politics of nuclear proliferation*. Baltimore: The Johns Hopkins University Press.

nuclear accord between the United States and the Soviet Union, founded on the bargain of American sovereign control over NATO-based nuclear weapons (offered in exchange for Soviet acquiescence to NATO nuclear planning) ultimately made the negotiation of the NPT possible.⁴⁹ It also answered the long-standing calls made by many smaller and non-aligned states for a commitment by the nuclear weapons states - in effect, the United States and the Soviet Union - to curbs on proliferation, and ensured the support of the allies of both Superpowers for a multilateral non-proliferation treaty.⁵⁰

Here, then, was the early period of optimism; a time during which the relief felt towards a non-proliferation treaty finally concluded overshadowed, for most states, their disquiet at having renounced, in international law, any resort to nuclear weapons in defence of their political independence, territorial integrity, and, ultimately, their very existence.⁵¹

Nevertheless, they now convened the 1968 *Conference of Non-Nuclear Weapon States*, almost immediately following the opening for signature of the NPT. Through this mechanism, the group of ninety-six state participants attempted to satisfy their concerns about the implementation of its terms.⁵²

⁴⁹Maddock suggests that US Arms Control and Disarmament Agency Director William Foster had, in early 1964, identified the NATO proposal for a "Multilateral Force" (MLF) as the most significant obstacle to a US/USSR accord on nuclear proliferation. The MLF was to be a force of nuclear missile-armed naval vessels, stationed in the North Atlantic ocean and manned by crews drawn from all the NATO states. This was unacceptable to the Soviet Union on the ground that it would constitute proliferation of *control* over nuclear weapons to non-nuclear weapon states. Its demise cleared the way for the eventual negotiation of the NPT. Maddock, S. J. (1997). *The nth country conundrum: The American and Soviet quest for nuclear nonproliferation 1945-1970*. (Doctoral Dissertation, The University of Connecticut). *Dissertation Abstracts International*, 58, 06A. At Chapter X, especially pp. 424-445.

⁵⁰Epstein, W. (1976). *The last chance: Nuclear proliferation and arms control*. New York: The Free Press. At p. 121. This work is a precursor of many later attempts, during the 1980s, to analyse the declining influence of the NPT during that decade, together with the dangers inherent in the burgeoning nuclear confrontation between the two Superpowers.

⁵¹The corollary of this compromise was the widespread call for specific security assurances from the nuclear weapon states, answered by the three co-sponsors of the NPT through Resolution 255 of the UN Security Council, following its opening for signature [UN Doc. S/RES/255 (1968)].

⁵²The Conference had its origins in UN General Assembly Resolution 2153 (XXI) of 17 November 1966, calling for a Conference of non-nuclear states to consider, well before the conclusion of the text of the NPT, the questions of the security of non-nuclear states, nuclear proliferation, and the peaceful use of nuclear explosives. It convened at Geneva, Switzerland, from 29 August to 28 September, 1968.

Conference Resolutions ranged widely over a complexity of issues surrounding the strength of security assurances by nuclear weapon states, eventual nuclear disarmament, nuclear safeguard arrangements, and the peaceful use of nuclear energy.⁵³ In this way, the majority of future non-nuclear States Parties made plain to the nuclear weapon states their views on the deficiencies they perceived as inherent in the Treaty. In practice, however, this strong beginning did not lead to a shift towards greater balance between the two sides of the nuclear divide.

The failure of the General Assembly to implement Conference decisions in its aftermath reflected both a fragmentation of views among the non-nuclear states, and a fundamental lack of interest by the nuclear powers in matters of security assurances and nuclear disarmament.⁵⁴ As a result, and in conjunction with the continuing interest of some developed, non-nuclear weapon states in nuclear armaments, the early enthusiasm for the NPT as global saviour, and complacency about its more obvious deficiencies, was quickly lost. Among such states were Australia, Sweden and the Federal Republic of Germany, each having been capable since the early 1960s, both financially and technically, of developing nuclear weapons within a short period of time.⁵⁵

The 1974 “peaceful” explosion of a nuclear device by India was also the source of a growing focus on the efforts of countries such as Pakistan to obtain allegedly commercial nuclear fuel processing plants which were later revealed as intended for nuclear explosive programmes.⁵⁶

⁵³*Supra*. At Note 47, pp. 126-134.

⁵⁴*Ibid.*

⁵⁵Meyer, S. M. (1984). *The dynamics of nuclear proliferation*. Chicago: The University of Chicago Press. At p. 41. Other “threshold” states able, in 1968, to produce nuclear weapons within five years, included Italy, India and Japan and Switzerland. See Table 1, Chapter Six.

⁵⁶*Ibid.* At pp. 15, 16. One reaction was the formation in 1975 of the Nuclear Suppliers Group (also known as the London Suppliers Group) of nuclear material exporting states. The 30-member group has as its goal the export of nuclear materials only under appropriate safeguards, physical protection and non-proliferation conditions, and the restriction of sensitive exports (such as nuclear trigger devices) which are likely to enhance the proliferation of nuclear weapons.

The “Second Cold War”

The first important change in fundamental perceptions about the NPT began during the early years of the so-called “Second Cold War” period of the Reagan - Bush Administrations from 1981 to 1993. The decline of hopes for the NPT as a dynamic bulwark against nuclear proliferation, held by many states, was confirmed and given form in the rising nuclear tensions evident between the United States, the Soviet Union, and their respective allies.⁵⁷ The result was a deep and sustained crisis for non-proliferation policy on both sides of the ideological divide, and severe atrophy of legitimate expectations of its ability to limit the spread of nuclear technology applied to weapons development.⁵⁸

Although an effective NPT remained an essential part of the strategic planning of both Superpowers, cooperation between them to limit the abilities and aspirations of potential regional nuclear states (such as North Korea and Iraq) declined, even though this carried with it the risk of destabilising their deterrent structure.

The most serious consequence of this development was an increasing propensity for some states to look to the future by laying the technological foundations for the possible acquisition of nuclear weapons, and the missiles with which to deliver them. This move was accompanied by the emergence of so-called “opaque” nuclear proliferation, or covert, unacknowledged but substantial progress towards (and achievement of) nuclear weapons acquisition.

As Thayer points out, a state which does not clearly violate its obligations under the nuclear non-proliferation treaty and regime avoids offending against an international political norm. It is therefore unlikely to be held to account in the absence of incontrovertible evidence of its violation.⁵⁹ Iraq faced the *Desert Storm*

⁵⁷*Op. cit.* At Note 43.

⁵⁸Davydov, V. (1990). The US-USSR relationship and its likely impact on nuclear proliferation. In M. P. Fry, N. P. Keatinge, & J. Rotblat (Eds.), *Nuclear non-proliferation and the Non-proliferation Treaty* (pp. 91-94). At pp. 92, 93. Berlin: Springer - Verlag.

⁵⁹*Op. cit.* At Note 44. B.A. Thayer, The causes of nuclear proliferation and the utility of the non-proliferation regime (pp. 75-129). At pp. 105, 106.

operations of a disparate Coalition of states in 1991 as a result of its ground invasion of the sovereign state of Kuwait, and not as a reaction to its nuclear ambitions.

Nor was covert nuclear proliferation limited in the nineteen eighties to the Iraqi case. India, Pakistan, South Africa, North Korea and Israel all either acquired nuclear weapons clandestinely during the so-called "Second Cold War" period under review, or were preparing to do so. Since then, only South Africa, as its *apartheid* policies unravelled, has renounced and destroyed the six devices it acknowledged having built.⁶⁰

In general terms, the period can be characterised as one in which the NPT was widely perceived to be in a state of stagnation. The majority of states, while not harbouring nuclear ambitions of their own, looked to one or other Superpower for nuclear protection, either as an ally, or through the security assurances made by them to States Parties to the NPT. Their faith in a stable and secure future was largely based on the stability of the nuclear deterrence postures of the United States and the Soviet Union, which they expected to endure for many years. It would *not* be secured solely through the effective operation of a multilateral nuclear weapons bargain, however legitimate it may be in international law.

Meanwhile, a small minority of states, such as South Africa, Israel, India and Pakistan, continued on their path to independent nuclear status outside the nuclear non-proliferation regime.⁶¹ Both groups were to be affected, as were all states and actors within the nuclear non-proliferation regime, by the collapse of the Soviet Union, and the period of power transition in the international system which that event initiated.

The Post Cold War Period

The period of over twelve years which has now elapsed since the sudden disintegration of the Soviet Union as a political unit within the society of states cannot be analysed merely as an extension beyond its two predecessors, at least in

⁶⁰*Loc. cit.* At Note 35, pp. 196, 197.

⁶¹*Op. cit.* At Note 43. Merlini, C. (1990). The US-USSR relationship and its likely impact on nuclear proliferation. (pp. 95-118). At pp. 106, 107.

respect of the nuclear non-proliferation regime. Rather, it must be regarded as the beginning of a new era in the development of global nuclear non-proliferation efforts, in terms both of the NPT in its present form, and alternative evolutionary paths - either through amendments to the terms of the Treaty, or regime development outside the scope of black-letter international law.

Towards the mid-point of the period, the 1995 *NPT Review and Extension Conference*, held in New York in April and May of that year, agreed to extend the NPT, unchanged and indefinitely, while retaining the continuity of five-yearly Review Conferences.⁶² Notwithstanding attempts by some states to make completion of a Comprehensive Test Ban Treaty (CTBT) and fissile material "Cut-Off" Treaty conditions for renewal of the NPT, its indefinite extension was a watershed for nuclear non-proliferation.⁶³ In simple terms, the regime surrounding the Treaty had, by 1995, gained sufficient authority and support that states, whatever their individual circumstances, were not prepared to take a leap into the dark by allowing the NPT to dissolve.

The risks inherent in a world without the keystone of a nuclear non-proliferation treaty were, in the end, seen as too high. Nevertheless, the paradox of unlimited extension of an outdated and fundamentally flawed multilateral nuclear treaty, in a world of rapid and unpredictable nuclear change, is one which awaits further study. From a practical diplomatic point of view, its extension may have been the only possible outcome.

In these circumstances, the future of the NPT must be subject to doubt on the grounds that effective arms control treaties which are not capable of amendment to address changing political realities, or are in a form which is not readily amenable to authoritative or timely interpretation and adjudication, may become useless.⁶⁴

⁶²The Conference decided to make the five-yearly reviews automatic, starting with the year 2000, instead of relying on a resolution of each Review Conference to mandate its successor, as was previously the case. Preparatory Conferences are to be held in each of the three years preceding the five-yearly Review Conferences, effectively establishing an almost continuous review process. Cirincione, J. (1999). A new beginning for the NPT. *Disarmament Diplomacy*, 13 [on-line]. Available: [www: http://www.acronym.org.uk/13npt.htm](http://www.acronym.org.uk/13npt.htm) .

⁶³*New realities: Disarmament, peace-building and global security*. (1993). New York: UN Office for Disarmament Affairs, Disarmament Information Programme. At p. 209.

⁶⁴Dahlitz has addressed the problems of the legal adjudication of disputes in the International Court of Justice. She concludes that grave problems exist for the Court's endeavours in matters involving

The Status of the Nuclear Non-Proliferation Regime

The nuclear non-proliferation regime is an idea, a standard, and an aspiration. It is both a matrix of international law instruments and a political accommodation, both an indispensable international reality and (in the eyes of some) a flawed and dangerous security gamble.⁶⁵ As discussed in the Introduction to this Chapter, it works to create norms of behaviour for all agents in the nuclear field, whether they are engaged in the generation of electricity, or the fabrication of explosive devices; in safeguarding the peaceful application of nuclear technology from diversion towards war, or in exporting material and expertise equally efficient in either endeavour.

The regime cannot confidently be ignored by any state, non-governmental organisation (NGO), or inter-governmental organisation (IGO). Nor can individuals and institutions with nuclear influence and decision-making powers inside the so-called “black box” of the state⁶⁶ afford to disregard the global consequences of actions which offend its principles and benchmarks, many of which have been gradually accumulated over a period of thirty years and more. From this perspective,

nuclear arms control. Important among these are the “cumbersome” nature of international judicial machinery, the haphazard nature of decisions needed to activate the process, and the unavoidable fact that the Court lacks sufficient authority to make decisions in the arms control arena which states will readily accept. Dahlitz, J. (1983). *Nuclear arms control with effective international agreements*. Melbourne: McPhee Gribble. At p. 112.

⁶⁵One of the most strident critics of the NPT and its regime has been K. Subramanyam, who has characterised them thus:

.... measure[s] to legitimize the nuclear arsenals of the five nuclear weapon powers, to license further unlimited proliferation quantitatively, qualitatively and spatially and give them hegemony over the development of nuclear technology in the developing world.

Infra. At Note 73 (1982).

⁶⁶The term “black box” is used here to connote the international law principle which ascribes opacity and equality to states which have fulfilled the formal requirements of statehood, as acknowledged by Article 2, paragraph 1 of the United Nations Charter: “The Organization is based on the principle of sovereign equality of all its members.” There is much evidence, however, that this principle is eroding, in the face of considerable resistance from states, at the beginning of the twenty-first century. The principle catalyst has been identified by Slaughter as “global governance,” in which the pre-eminence of the state is being to some degree undermined by supra-state, sub-state, and non-state actors. The result, she asserts, is “cooperative problem-solving,” which results in a network of linkages between, for example, Microsoft, the Roman Catholic Church, and Amnesty International, as well as, to take another example, the European Union, the United Nations, and Catalonia. Slaughter, A.M. (1997). *The real New World Order*. *Foreign Affairs*, 76 (5), 183-197. At 183, 184.

the 1968 *Nuclear Non-Proliferation Treaty* and the nuclear non-proliferation regime are functionally indistinguishable, being - for all practical and analytical purposes - two sides of the same coin.

Those who have objected to the treaty and regime most often point to the obvious and indisputable fact that it entrenches discrimination between states; the privileges of the nuclear weapon “haves”, all with permanent member status at the UN Security Council (with veto powers) are distinguished from all nuclear “have nots,” without veto powers, or a legal nuclear weapon option. Conversely, the states which champion the treaty and its regime are united in their conviction that, in the end, the world had no realistic alternative to a bargain in which easier and cheaper access to nuclear technology must be balanced against strict enforcement of the non-proliferation of nuclear weapons.⁶⁷

While the latter proposition had considerable merit during the Cold War decades, when the pre-eminent global security imperative was the stable yet confrontational relationship between the two nuclear superpowers, it has less credibility at the beginning of the new millennium.

Post Cold War Change

Two events have combined to change the nature of the nuclear non-proliferation regime in fundamental and permanent ways. These are the end of the Cold War in 1989, as the Soviet Union collapsed, and the perceived need - in the period leading up to 1995 - to extend the NPT indefinitely.⁶⁸ In addition, the environmental social movement has exerted substantial secondary influence over the nuclear sphere, both civil and military.

⁶⁷Pilat, J.F., & Nakhleh, C.W. (1998). A treaty reborn? The NPT after extension. In R.G.C. Thomas (Ed.), *The nuclear non-proliferation regime: Prospects for the 21st century*. (pp. 41-55). At pp. 42-45.

⁶⁸The possibility of indefinite extension is addressed in Article X, paragraph 2 of the NPT, which mandates a Conference, twenty-five years after its entry into force, to decide - by a majority of the States Parties - whether the Treaty will be continue in force indefinitely, or be extended for an additional period, or periods. Refer to Appendix II.

First, the global geopolitical environment was subject to sudden and irreversible disruption when the Soviet Union failed as a discrete and coherent political unit. Global stability has been replaced by regional instability, overwhelming power and influence (exercised primarily by the US and USSR) by growing indecision and the declining economic, military and diplomatic influence of the USSR.

More specifically, agreement between America and Russia on the need to restrict the spread of nuclear weapons has been supplanted by uncertainty about the future role (if any) of nuclear weapons in warfare. As the two strongest nuclear weapon states reduce their nuclear arsenals, their global influence may erode, to eventually be replaced by the superpower aspirations of states such as India and China.⁶⁹

No less significantly, global confrontation has been replaced by regionally-based conflict (with or without a nuclear component), while the technology and expertise needed to construct both sophisticated and crude nuclear weapons is ever more widely distributed.⁷⁰

Each of these changes has impacted on perceptions of the continuing adequacy of the nuclear non-proliferation regime as the single defensive international structure designed to hold back the spread of nuclear weapons into unstable and politically transitional regions of the world.

The many nuclear arms control and disarmament treaties and agreements which form the legal identity of the regime - from the early "Exchange of Letters" on principles for disarmament negotiations between the USA and the USSR of 1961 (the McCloy - Zorin Statement)⁷¹ to on-going negotiations in the Conference on

⁶⁹The new nuclear status of India following its three overt nuclear weapons tests during May, 1998 has delivered to it widespread acknowledgment around the world of its putative, if not embryonic, nuclear superpower status. MacKinnon, I. (1999, May 11) Nuclear glow on Buddha's face. *The Australian*, p.9.

⁷⁰*Op. Cit.* At Note 67, pp. 44, 45. The ability of developing states to construct unsophisticated, though operational, nuclear devices is more widespread as a result of the end of the Cold War, as is the possibility of theft by individuals and criminal organisations, especially from Russia, and other peripheral components of the former Soviet Union. Search for 'suitcase' N-bombs. (1997, December 3). *The West Australian*, p.1.

⁷¹UN Doc. A/RES/1722 (XVI), 20 December 1961.

Disarmament for a fissile material “Cut-Off” Treaty⁷² - are each affected in different ways by the pace of change. At some point, therefore, the changing relationships between the operation of the various treaties may begin to reduce the ability of the regime, *as a regime*, to react effectively to rapidly evolving non-proliferation emergencies. Thus, for example, increased emphasis on halting the production of weapons-grade fissile material in developed states could result in insufficient attention to the horizontal proliferation of weapons technology in less technically advanced countries.

The second primary influence on the regime during the past decade, which has led some scholars to refer to it as a “new regime,” was its indefinite extension in 1995. In the years leading up to the 1995 Review and Extension Conference, held in New York from 17 April to 12 May of that year, growing disquiet over the prospects for renewing the NPT led to a widespread re-evaluation of its importance for the world.

Many governments, international organisations and scholars began to think about the consequences for nuclear proliferation of allowing the NPT to lapse, and about mechanisms which might replace it. The result was a wide consensus of alarm at the possibility of the dissolution of the central pillar of nuclear non-proliferation, whatever its faults, and the effects of that outcome on other major arms control regimes.⁷³

⁷²The Acronym Institute (1999). *Continuing stalemate at the CD* [on-line]. Available WWW: <http://www.acronym.org.uk/index.htm>.

⁷³Clements, K. P. (1994-1995). Imagining a world without nuclear weapons. *Current Affairs Bulletin*, Dec. 1994/ Jan. 1995). 4-10. At 2, 3.

Cf. Simpson, J., & Howlett, D. (1994). The NPT renewal conference: Stumbling toward 1995. *International Security*, 19 (1), 41-69. Also: Dunn, L. (1990). The collapse of the NPT - What if?. In J.F. Pilat & R.F. Pendley (Eds.), *Beyond 1995: The future of the NPT regime* (pp. 27-40) New York: Plenum; Millar, C. (1995). Non-proliferation Treaty extension a major goal. *Insight*, 4 (5), 5, 6, 16; Wilson, M. (1995). Australian interests, policies and future directions. In *The nuclear future: Asian and Australia and the 1995 Conference on Non-Proliferation: Australia - Asia Papers No. 74*. (pp. 37-44). Brisbane: Griffith University Faculty of Asian and International Studies, Centre for the Study of Australia-Asia Relations.

The many discrete deliberative and negotiating bodies within the UN arms control system are discussed by Goldblat. They are not limited to nuclear disarmament, but address the full range of conventional armaments, together with other weapons of mass destruction (e.g. chemical and biological/toxin agents). Goldblat, J. (1982). *Agreements for arms control: A critical survey*. London: Taylor & Francis (S.I.P.R.I.).

Without a successor treaty negotiated on a non-discriminatory basis (or any prospect of one which included the declared nuclear weapon states) the choice for most States Parties to the NPT became clear. Extend the treaty, either finitely or indefinitely, changed or unchanged - or face an uncertain and unstable security future of the kind confronting the Indian sub-continent.

In the context of growing regional instabilities following the breakdown of Cold War security structures, the urgency of the need for NPT extension overcame the resistance of many states seeking redress for their grievances over its perceived inequities.

The interest shown by many states in nuclear power generation, which peaked following the quadrupling of the cost of crude oil on world markets in 1974, is now declining as environmental concerns and alternative energy sources become more apparent.⁷⁴

The growing recognition around the world of environmental concerns of all kinds, from global climate change to biodiversity, from resource depletion to toxin pollution of food sources, has exerted a powerful influence over the long-term credibility and sustainability of nuclear power generation. It has also highlighted its high cost when compared to less controversial (non-polluting and renewable) technologies, such as those using solar, wind, tidal, hydraulic and geo-thermal energy sources.⁷⁵

Thus, the risks associated with diversion of civilian nuclear technologies to weapons manufacture will increasingly become less contestable as viable long-term

⁷⁴*Ibid.* The release of large amounts of ionizing radiation from the Chernobyl nuclear power generating station in the Ukraine, following an explosion in April, 1986, is the best known recent catalyst for this movement.

⁷⁵The Organisation for Economic Cooperation and Development has produced an extensive report on the issues surrounding the continued importance of nuclear power generation in the twenty-first century. It identifies the accelerating decline of operational nuclear power plants around the world, especially in the first decade of the new millennium, as an essential element in the engagement of global energy policies with the economic and environmental trade-offs between nuclear energy and greenhouse gas-emitting fossil fuels. Organisation for Economic Cooperation and Development. (1998). *Nuclear energy in the OECD: Towards an integrated approach. Report by the High Level Advisory Group on the future of the OECD Nuclear Energy Agency to the Secretary-General of the Organisation for Economic Cooperation and Development*. Chapter 3 - Strategic directions and priorities of NEA actions [on-line]. Available WWW: <http://www.oecd.org/sge/documents/nuclearagency.htm> .

alternatives to nuclear power technology become available. They will be replaced by the less controllable risks inherent in a covert international trade in weapons-grade fissile material and other weapons technologies. Here, the possibility of credible threats from irresponsible national leaders, and even criminal organisations and individuals (who will not be deterred from *using* nuclear weapons) cannot be discounted.

The result of the changes discussed above has been a transformation in the character and future direction of the nuclear non-proliferation problem. States may no longer usefully be classified as nuclear or non-nuclear weapon states. Rather, in a world in which *every* state is able to acquire nuclear explosives, the following classification is of greater analytical use:

- States without nuclear weapons, or interest in them.
- States without nuclear weapons, but with an acknowledged interest in them.
- States with nuclear weapons, but without an obvious need for them.
- States with nuclear weapons solely for deterrence against attack.
- States with nuclear weapons for aggressive use.⁷⁶

Using this classification, control over nuclear proliferation through collective security measures (under the aegis of an effective United Nations organisation) becomes easier and more effective.

On both the supply and demand sides, those proliferating states, when identified by their place in this schema, would be less able to disguise their intentions or actions in the face of UN anti-proliferation efforts. They would also tend to come under increasing scrutiny from states whose suspicion of covert proliferation activities would be more readily confirmed by a better financed International Atomic Energy Agency. The case of Iraq's covert nuclear weapons

⁷⁶This taxonomy has been suggested, in part, by Rathjens in the context of the need for a "broad reconsideration" of nuclear proliferation in the opening years of the new millennium. Rathjens, G. (1998). Nuclear proliferation following the NPT extension. In R.G.C. Thomas (Ed.), *The nuclear non-proliferation regime: Prospects for the 21st century*. (pp. 25-40). Houndmills: Macmillan. At pp. 32, 33.

programme, mentioned above, may, in these circumstances, have followed a different course.

In summary, three principal roles can be distinguished for the current regime of non-proliferation: as a legal barrier against nuclear proliferation, as the manifestation of a norm of non-proliferation, and as a means to build confidence in non-proliferation through verification of adherence to its provisions.⁷⁷ In this way, the regime demonstrates its universal nature through the complexity of its identity: as law, as a psychological vector, and as a practical control mechanism.

Formally speaking, it is a legitimate component of conventional (and customary) public international law on the use of force by states. As an international and multilateral security instrument, it creates reciprocal and binding commitments in law which are subject to interpretation and adjudication in international tribunals, and which carry the full force of formal obligation in the international sphere.

Second, through support over time by the majority of states, during which they have expressed their sustained commitment to its provisions at five-yearly Review Conferences, the regime has created and embodied a norm of nuclear non-proliferation. In doing so, it has established a so-called “firebreak” between conventional and nuclear weapons whose breach would entail an illegitimate contravention of standards of behaviour acceptable to the great majority of nation-states.⁷⁸

States have come to view nuclear weapons as qualitatively distinct from conventional weapons (and even from chemical and biological weapons). The sheer power of these devices, and their demonstrated effects on people and property, was able to construct in the minds of nuclear decision-makers a psychological barrier - and perhaps a moral barrier - against their threat or use.

⁷⁷Scheinman, L. (1990). Does the NPT matter? In J.F. Pilat & R.E. Pendley (Eds.), *Beyond 1995: The future of the NPT regime*. (pp. 53-63). New York: Plenum. At p. 55-58.

⁷⁸*Ibid.* It is only since the nuclear explosions conducted by Pakistan and India in May 1998 (or possibly since India's “peaceful” nuclear explosion of 1974) that the taboo against overt breach of the nuclear “firebreak” has begun to break down. Having commenced, this process may gather pace in the first decade of the new century.

Third, since the regime calls for, and applies, comprehensive and transparent safeguard measures through the work of the International Atomic Energy Agency, the Agency is the primary source of mutual confidence in each State Party that all others are unable covertly to circumvent their legal commitments not to build nuclear weapons of war.⁷⁹ It incorporates, therefore, practical measures which contribute, in material ways, to restricting the spread of nuclear aggression.

Using these criteria, the regime of nuclear non-proliferation can be identified, and its central roles described. The widest expression of its mission, however, remains its place within the wider arms control and disarmament environment.

Influence on Disarmament Law

As proposed in the Introduction to this Chapter, the two most important aspects of that mission are its influence on expectations of outcomes for the international law of arms control and disarmament, and on the structure and status of international law on the use of force. It is through those relationships that the nuclear non-proliferation regime exerts its effect on the policies of nation-states.

On the question of the influence of the regime on aspects of the international law of arms control, its most significant effect may be that it recognises explicitly that nuclear weapons are legal. By discriminating between nuclear and non-nuclear weapon states, and by protecting the nuclear status of nuclear weapon states, the NPT makes plain its intention to include nuclear weapons within the range of weapons which may be legally used (subject always, of course, to the customary, conventional and United Nations rules of war).

The force of that intention has been considerably reduced, however, by the 1996 Advisory Opinion of the International Court of Justice in the *Nuclear Weapons Case*.⁸⁰ In that Judgment, the Court concluded, *inter alia*, that the threat or use of

⁷⁹*Ibid.*

⁸⁰35 *I.L.M.* 809 (1996).

nuclear weapons would generally be contrary to the rules of international humanitarian law,⁸¹ and that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”.⁸²

It can be noted that the Court delivered its opinion in spite of argument led by the United States and the United Kingdom which expressly pointed to the discriminatory nature of the Treaty as *proof* of the legality of the threat or use of nuclear weapons.⁸³ Nevertheless, the continuing central status of the NPT in nuclear disarmament law and practice confers on it a considerable negative effect over the ability of other disarmament and arms control laws to work effectively to curb the use of increasingly efficient high-technology weapons available to the armed forces of modern developed states.

It may be argued that the core of that influence lies in the fact that the NPT and its regime has done little, in terms of Article VI, to progress the cause of general disarmament of the worst of all weapons. Nor has it halted the steady diffusion around the world of the technology and expertise of nuclear war. As such, therefore, it is unable to show a clear lead in the development of international law directed at the general prohibition of new classes of weapons.

While acknowledging the thrust of this argument, some progress has been made in the prohibition of weapons widely accepted as prohibited in international humanitarian law. The recently amended *Protocol II on Prohibition or Restriction on the Use of Mines, Booby Traps and other Devices annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects* is an example of this trend.⁸⁴

⁸¹*Ibid.* Paragraph 105 (2) E of the Court’s *Dispositif*. Judgment held on the casting vote of the President of the Court.

⁸²*Ibid.* Paragraph 105 (2) F of the Court’s *Dispositif*. Judgment held unanimously.

⁸³Hubbard, C. (1997). *A critique of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996. Unpublished honours thesis, Edith Cowan University, Perth, Western Australia. Chapter III: Argument and evidence led by states.

⁸⁴Concluded at Geneva, 3 May 1996. Entered into force 3 December 1998. [ATS 17; 35 ILM 1433; Cm 3581]. Humanitarian law, and the “Hague” rules on the conduct of war, have been consolidated in the four 1949 *Geneva Conventions* [75 UNTS 3] and their *Protocols I and II* [1125 UNTS 3 and 1125

Thus, the influence of the nuclear non-proliferation regime on disarmament, and on arms control law generally, is mixed. There is no doubt that the NPT itself has been a qualified success in terms of its explicit aims, and as an example of the use of international law to limit the excesses of the crime of war. However, its deficiencies as a disarmament instrument should be regarded as an incentive for the society of states to devise better disarmament mechanisms, both in law and international political relations, aimed at fulfilling the general disarmament aspirations contained in Article VI.

As an instrument of international law, and in the context of its limitations, it has advanced the cause of advocates of the law as a practical, self-enforcing rule-set regulating the use of force between states. Their argument concerning the proven ability of an example of conventional, black-letter international law to halt the aggressive use of nuclear weapons after their initial deployment by the US against Japan is less convincing than the NPT's work in sustaining and advancing international law for individuals.

The evolution of instruments reflecting concern for the protection of basic human rights in war - which began at Solferino, and with the first *Geneva Convention* of 1864 - has continued through the 1948 *Convention on the Prevention and punishment of the Crime of Genocide*,⁸⁵ and in many, more recent, treaties.

By the degree of its success in nuclear non-proliferation, the NPT and its regime has underpinned the consensus of most states that there are methods of waging war which constitute crimes against humanity. The 1996 Advisory Opinion of the International Court of Justice in the "Nuclear Weapons Case" has supported that contention.

UNTS 609 respectively]. The customary law rule on the legality of weapons of war is encapsulated in Article 22 of the Regulations on Land Warfare annexed to the *Hague Convention IV* of 1907 [*UKTS* 9 (1910), Cd. 5030]:

The right of belligerents to adopt means of injuring the enemy is not unlimited.

⁸⁵78 *UNTS* 277.

Australia and Nuclear Non-Proliferation

Although the study will address below, and in greater detail, Australia's role in the negotiation and implementation of the NPT, it is useful here to introduce the context of its involvement in nuclear matters, and the pattern of its nuclear policy development from the nineteen fifties to the present day.

As will become evident later in the study, Australia has often been regarded, by both local and international commentators, as exhibiting an ambivalent (and at times contradictory) attitude towards nuclear affairs. Since the early nineteen fifties, the three broad strands of Australia's nuclear policy - its political, economic and security-based dimensions - have been subject to opposing pressures which compete for attention, and result in an impression of impaired or absent policy coherence.⁸⁶

As a component of the Western Alliance, a treaty ally of the United States from 1951,⁸⁷ and a member (at that time) of an important regional security agreement, the Southeast Asia Collective Security Defense Treaty - SEATO, Australia has been concerned to accommodate the wishes of its "great and powerful friends" for support in their attempts to control the spread of nuclear weapons.

At the same time, it has allowed Britain to test nuclear weapons on its territory, thereby directly assisting the horizontal spread of nuclear weapons only seven years after their aggressive use over Japan.⁸⁸

⁸⁶Findlay divides the facets of Australian foreign policy in its widest dimension between "political, security and economic". The study uses this trichotomy as the most useful first-level distinction for analysis of the components of Australia's nuclear policies. Findlay, T. (1991). *Working paper no. 107: The making of a moral ornament: Australian disarmament and arms control policy 1921-1991*. Canberra: Australian National University, Peace Research Centre. At p. 1.

⁸⁷The Australian, New Zealand, United States collective security treaty (the ANZUS Treaty) was signed in San Francisco on 1 September 1951.

⁸⁸The short and long term effects of atomic detonations on the people of Hiroshima and Nagasaki were well known to the US, British and Australian governments in the early nineteen fifties through the work, in Japan, of the US Atomic Bomb Casualty Commission and the British Commonwealth Occupation Forces (BCOF). Yamazaki, J.N. (1998). The realities of nuclear war: Memories of Hiroshima and Nagasaki. In R.G.C. Thomas (Ed.), *The nuclear non-proliferation regime: Prospects for the 21st century* (pp. 333 - 350). Houndmills: Macmillan. At pp. 334, 335.

Britain conducted nuclear tests at several sites within Australia from 1952. Walsh, J. (1997). Surprise down under: The secret history of Australia's nuclear ambitions. *The Nonproliferation Review*, 5 (1) [on-line]. Available WWW: <http://cns.miis.edu/pubs/npr/walsh51.htm>. At p. 3.

Further, Australia has recently been revealed as a persistent, and ultimately frustrated, prospective purchaser of nuclear weapons from Britain in the period 1956 to 1963 - weapons which it intended to keep fully under its national control.⁸⁹ Again, from 1964 to 1972, almost until its ratification of the NPT in January 1973, Australia took serious steps to secure an option to develop nuclear weapons, using indigenous resources, within a time frame estimated, in 1968, at between seven and ten years.⁹⁰

Australia signed the NPT on 27 February 1970, but withheld ratification until January 1973, following the installation in 1972 of the Australian Labor Government led by Prime Minister E. G. Whitlam.⁹¹

In this context, the advent of a nuclear-armed China in 1964, the accelerating withdrawal of British forces from the region, and the later disengagement of the United States from Vietnam had all combined to increase anxiety about Australia's strategic security position.

A major component of its nuclear weapons planning was the 1969 proposal for the construction of a 500 MW nuclear power generation reactor on Commonwealth territory at Jervis Bay, NSW. Such an installation would be vital in supplying suitable fissionable material for use in nuclear weapons manufacture. Construction of the installation was deferred in August, 1971 by the McMahon Liberal/ Country Party Coalition Government following the removal from office of the former Coalition Prime Minister, John Gorton (a nuclear advocate) and never revived. Its fate was sealed by the election of E. G. Whitlam's Labor Government in 1972.⁹²

A further dimension of Australia's nuclear policy throughout the post-war period has been its uranium export industry. With a resource estimated at around 30

⁸⁹*Ibid.* (1997). At pp. 2-12. See also: Reynolds, W. (2000). *Australia's bid for the atomic bomb*. Carlton South: Melbourne University Press.

⁹⁰Australian Archives Document A 1838/346: TS 919/10/5 Pt. 4. (March, 1968). *Practicability of Australian Independent Capability*. Department of External Affairs. At p. 212.

⁹¹Carr, M. (1979). *Australia and the nuclear question: A survey of government attitudes, 1945 to 1975*. Unpublished Masters thesis, University of New South Wales, Sydney, New South Wales. At pp. 142, 192.

⁹²*Ibid.* At p. 146 *et seq.* *Supra.* At Note 90, pp 147, 148, 158-161.

per cent of the world's reserves of readily extractable uranium ore, Australia, it appears, has been unable to ignore the substantial economic benefits available from mining, milling and exporting uranium. From 1944, when the British government asked Prime Minister Curtin to initiate uranium prospecting in South Australia - with an option on any uranium produced - to the present large-scale mining, milling and exporting operations, Australia has been an important source of uranium feedstock for both civilian and military nuclear programmes worldwide.⁹³

Although exports of uranium oxide ("yellow-cake") are regulated through Australia's bilateral safeguards agreements with client states, as well as through Australia's IAEA safeguards obligations, periodic doubts have been expressed about the strength of the non-proliferation security they afford.⁹⁴

Finally, Australia has, from 1972, been a consistent and active proponent of nuclear disarmament and arms control in many international fora. Australia has been able, within specific limits, to influence the course of arms control and nuclear non-proliferation to a degree far greater than its world position would suggest, having begun its conversion from nuclear aspirant to non-proliferation activist during the NPT negotiation phase.⁹⁵

Conclusion

The 1968 *Nuclear Non-Proliferation Treaty*, and its penumbra of understandings, agreements and arms control treaties, is the single most important component of international law on nuclear arms control. It forms the central pillar which supports

⁹³*Ibid.* At pp. 17, 18.

⁹⁴*Op. Cit.* At Note 86, pp. 5, 6. Bilateral safeguards agreements are overseen by the Australian Safeguards Office.

⁹⁵The high point, in recent years, of Australia's nuclear activism was the publication of the *Report of the Canberra Commission on the Elimination of Nuclear Weapons* in August 1996. A group of 17 distinguished persons with vast experience and expertise in the field of nuclear arms control, the Commission presented a pragmatic programme of incremental steps designed to result in phased reductions, and eventual elimination, of nuclear weapons. It has received recognition and acclaim around the world. Canberra Commission on the Elimination of Nuclear Weapons (1996). *Report of the Canberra Commission on the Elimination of Nuclear Weapons*. Canberra: Commonwealth of Australia.

and reinforces a range of subsidiary, but vital, treaties, agreements and understandings in this most significant and difficult area of law, where national interests and policies usually intersect only with caution and suspicion.

As the consternation expressed by many states in the period leading up to indefinite extension in 1995 indicates, a great majority of the international community of states was not prepared to take the risks they saw as inherent in allowing the NPT to collapse. In their view, its demise would have grave consequences for the *very notion* of nuclear non-proliferation as a global norm. Furthermore, such an outcome would undermine the International Atomic Energy Agency's verification work, and would destabilise international security.⁹⁶

At the same time, many States Parties reinforced their preference for supporting the nuclear *status quo* by refusing to agree to any changes aimed at enhancing the Treaty's efficiency and force. As discussed above, a number of its fundamental characteristics have hindered, rather than assisted, its work.⁹⁷ Nevertheless, the NPT remains in force, with enhanced mechanisms which allow for automatic, rather than *ad hoc*, Review Conferences.⁹⁸

Australia's involvement in the negotiation of the NPT, which forms a substantial part of this study, and its subsequent efforts to enhance nuclear arms control in all its aspects, underlines the vital importance of this Treaty to the small and middle powers as well as the nuclear weapon states. It is to Australia's specific concerns that the study now turns.

⁹⁶Pilat, J.F. (1990). A world without the NPT? In J. F. Pilat & R. E. Pendley (Eds.), *Beyond 1995: The future of the NPT regime* (pp. 151-163). New York: Plenum Press.

⁹⁷Millar has argued that much of the progress towards the basic aims of the NPT - horizontal and vertical non-proliferation, peaceful cooperation, and nuclear disarmament - has been achieved at the five yearly Review Conferences held since 1975. Millar, C. (1995). Non-proliferation Treaty extension a major goal. *Insight*, 4 (5), 5-6, 16.

⁹⁸The Sixth NPT Review Conference (which was the first Conference following the indefinite renewal of the treaty in 1995) was held in May 2000 at Geneva, Switzerland. It has been judged to be successful, to the extent that it was able to produce an agreed Final Document on the future of nuclear non-proliferation efforts. The Final Document included, *inter alia*, an agreed *Programme of Action (Next Steps) on Nuclear Disarmament*. Johnson, R. (2000). *Successful conference: Now words into actions* [on-line]. Available WWW: <http://www.acronym.org.uk/npt18.htm>.

CHAPTER TWO

AUSTRALIA AND THE NPT: POLICY AMBIVALENCE

Introduction

In 1975, almost three years after Australia had ratified the 1968 *Nuclear Non-Proliferation Treaty*, one of its most trenchant critics, Sir Philip Baxter,¹ asserted that "the concept that all decisions of government should be the subject of public debate ... is a dangerous heresy."² As the former head of the Australian Atomic Energy Commission, and a central figure in the Australian nuclear debate, Sir Philip was expressing a fundamental belief held by fellow supporters of a "nuclear Australia": that nuclear affairs were matters for governments and their expert advisers alone, and should not be open for popular debate and decision.

Baxter went on to maintain that only a small proportion of the population (and few among their elected representatives) were capable of understanding the issues involved in nuclear affairs.³ As a result, nuclear decision-making which affected national security, energy policy, international relations, and national defence must be left to governments.⁴

Baxter's views are representative of others both within and outside Australian government circles - such as nuclear advocates at the Department of Defence and influential Australian academics⁵ - whose resistance to global nuclear non-proliferation

¹ For a summary critique of Baxter's nuclear advocacy, see: Martin, B. (1980). *Nuclear Knights*. Dickson, ACT: Rupert Public Interest Movement Inc. At pp. 41-68.

² Baxter, J.P. (1975). Some comments on Ann Mozley Moyal's 'The Australian Atomic Energy Commission: A case study in Australian science and government.' *Search*, 6 (11-12), pp. 456-458. At p. 458.

³ *Ibid.*

⁴ *Ibid.*

⁵ Walsh, J. (1997). Surprise down under: The secret history of Australia's nuclear ambitions. *The Nonproliferation Review*, 5 (1). See especially "The Indigenous Capacity Stage" (1964-1972). Hymans notes the pro-proliferation views of Australian political scientist A L Burns who, in September 1964, promoted a simple "nuclear transfer" of nuclear weapons from the United Kingdom (as reported in 1966 by A. Clunies Ross and P. King in their study, *Australia and Nuclear Weapons: the Case for a Non-Nuclear Southeast Asia*). This echoed a similar discussion between Prime Ministers Menzies and Macmillan in 1961 in which Menzies sought a British obligation to supply Australia with nuclear

efforts influenced Australia's initial reaction to the NPT. Those pro-nuclear views within government were also of vital significance in the outcome of American efforts to convince Australia to accede to the treaty as a reliable supporter of the Western alliance.

Australia was a concerned observer and participant in the processes of international debate, negotiation and decision which resulted in the opening for signature of the *Nuclear Non-Proliferation Treaty* on 1 July 1968. Australia also played a substantial role, primarily during the period immediately preceding that event, in establishing the broad outlines of the Treaty's later interpretation.⁶ It did so, initially, through its bilateral relations with the United States, and later through its participation in the evolution of the global "regime" of understandings, trade-offs and accepted practices which now underpins its operation.

It should be noted, however, that Australia's role at this time was necessarily limited to the "explicit" process of treaty evolution outlined in Chapter One. The more "implicit" mode of evolution (such as the development of interpretations of the treaty by States Parties based on their own understanding of its terms) did not begin until the Treaty, having entered into force on 5 March 1970 and been established as a multilateral international instrument, began to demonstrate its limitations. The most serious example of the Treaty's practical limitations was the refusal of the nuclear weapon states to take meaningful steps to limit the nuclear arms race, as required under Article VI.

This chapter will trace the outline and general structure of Australia's early contribution to the debate on the spread of nuclear weapons. In doing so, it will discuss the struggle for nuclear policy dominance within key elements of the Australian bureaucracy and elsewhere. That struggle represented - and to some degree created - the unmistakable ambivalence Australia displayed (especially during the negotiation and establishment of the NPT, and in the United Nations General Assembly) to a world increasingly convinced of the need to curb the global proliferation of these devices.

weapons, if ever necessary for its defence, in exchange for Australia's support for Macmillan's advocacy of a global nuclear test ban treaty. Hymans, J.E.C. (2000). *Isotopes and identity: Australia and the nuclear weapons option, 1949-1999. Nuclear Nonproliferation Review* (Spring), pp. 5, 8.

⁶ Arms Control and Disarmament Agency (1999). *Treaty on the Non-proliferation of Nuclear Weapons* [on-line]. Available WWW: <http://www.acda.gov/treaties/npt/.htm>.

Having established the broad context of Australia's nuclear policy development, and its actions at relevant United Nations forums, the chapter will consider the range of responses available to Australia on the terms of the Final Draft of the proposed NPT, as it emerged from US / Soviet negotiations at Geneva during 1967 and 1968. This discussion will entail analysis of a range of political, social and economic influences, both within and outside government, and at home and abroad, on Australia's nuclear policy debate. Prominent among them will be the influence of certain individuals (such as the Prime Minister, John Gorton, and the Minister for External Affairs, Paul Hasluck) on its outcome, as well as the effects of popular and academic debate, and the influence of the international market for uranium.

It will also involve the introduction of one of the central themes of the study: the dialogue between the Australian Department of External Affairs (DEA) and the United States Arms Control and Disarmament Agency (ACDA) on the evolution and interpretation of the terms of the NPT. It will be argued, in subsequent chapters, that this dialogue reflected both US determination to have *all* its allies accede to the treaty (not merely the North Atlantic Treaty Organisation states) *and* the policy outcomes of an increasingly coherent Australian nuclear debate.

One of the early results of these internal and external tensions within the nuclear proliferation debate was the refusal in July 1968 of the Australian Government, led by Prime Minister John Gorton, to immediately sign and ratify the newly opened NPT - with or without reservations or agreed interpretations - as the United States Johnson Administration had urged. Gorton's antipathy towards the NPT was obvious in his remarks to the British High Commissioner to Canberra, Charles Johnstone, as reported by Johnstone to London in August 1968. Johnstone reported Gorton as stating that Australia would not sign the NPT, or that, if it did so, it would not ratify it. Gorton therefore held the personal belief that it would be "stupid" to sign the treaty without any intention of ratifying it. Any pressure, however intense, from either the US or the United Kingdom would not change the position of the Australian government on these points.⁷

That resistance to the NPT, unwelcome as it was in Washington, had been rehearsed earlier that year by the Department of External Affairs through diplomatic channels, and had forced the United States to try to address Australia's concerns about

⁷ *Op. cit.* At Note 5 (2000), p. 10.

the terms of the treaty. In doing so, the Americans found themselves obliged to develop their own interpretations of the treaty's provisions beyond what they had already agreed with their closest ally, the United Kingdom, and their Soviet rival. Washington was compelled to find explanations and meanings for elements of the treaty text which, against its expectations, appeared necessary to satisfy an important non-nuclear Western ally of long-standing located in a region then of vital interest to the United States.⁸

America initially failed to convince Australia that it should sign and ratify the NPT. By its recalcitrance Australia - the only Western ally actively to resist the treaty after its opening for signature - acted as an evolutionary catalyst. Through its steadfast refusal to be coerced into acquiescence on the terms of a nuclear non-proliferation pact whose obligations seemed to threaten its national interests, Australia contributed to the early evolution of the regime of non-proliferation which now surrounds the NPT.⁹

The Australian Nuclear Policy Debate

The contest for nuclear policy dominance, which intensified during 1967 and 1968 between elements of the Australian federal bureaucracy, was a microcosm of the wider nuclear policy debate within Australia. In practical terms, that contest was a test of strength between two opposed factions within the Australian bureaucracy. One, led by the Australian Atomic Energy Commission and its Chairman, Sir Philip Baxter, together with senior officers in the Department of Defence and armed forces, maintained that Australia should either acquire nuclear weapons, or develop an ability to manufacture them indigenously within a short time, should the need arise. Notwithstanding the insistent urgings of the United States, Australia should, in their view, have nothing to do with a nuclear non-proliferation treaty.

⁸ The general level of importance which US President Johnson attached to America's alliance relationship with Australia at this time is clear from the prominence he accorded to the visit of Prime Minister Gorton to Washington from 28 May to 3 June 1968. It has been suggested, however, that this was also a reaction to Washington's failure in late March 1968 to brief Gorton on its decision to de-escalate the bombing of North Vietnam, together with concern over the Australian Prime Minister's "semi-public attitude towards Australia's future defence position in South-East Asia". Ramsey, A. (1968, May 2). The red carpet treatment. *The Australian*, p.2.

⁹ *Supra*. At Note 6.

Baxter, who dominated the Australian Atomic Energy Commission from the time of his appointment in September 1956 until his resignation in 1973, was implacably opposed to Australian ratification of the NPT. One assessment, cited by Carr, makes the following observation:

He saw himself, and by extension the Commission, as the central and sole source of policy proposals for nuclear developments in Australia, and as the Government's fountainhead of atomic knowledge and ideas.¹⁰

The opposing faction, led by senior officers in the Department of External Affairs,¹¹ of which the most influential was First Assistant Secretary M.R. Booker, was convinced that Australia's future security should not be tied to nuclear weapons as a deterrent against attack.¹²

In May 1967 Prime Minister Holt and the Cabinet's Defence Committee had commissioned a report from the Joint Planning Committee of the Department of Defence on the possibility of "an independent nuclear capability by manufacture ... as well as possible arrangements with our allies." One reason given for the request was that Australia was likely to be asked to "subscribe to a non-proliferation treaty".

The JPC report, delivered in February 1968, concluded that "[Australia] has no requirement for an independent ... nuclear capability." Balancing this support for DEA's position was the opposition of the Secretary of the Department of Defence, Sir Henry Bland, to Australian signature of the NPT which became apparent as DEA prepared for negotiations on the new treaty with the United States ACDA negotiating team during April 1968.¹³

¹⁰ Moyle, cited in Carr, M. (1979). *Australia and the nuclear question: A survey of government attitudes, 1945 to 1975*. Unpublished Masters thesis, University of New South Wales, Sydney, New South Wales. At p. 85.

¹¹ Hereafter usually referred to in the text as "DEA".

¹² Booker's study of Australian foreign affairs policy deficiencies from 1939 to 1975 makes the point that the views of Australian nuclear advocates stemmed from a lack of flexibility and realism in their assessment of Australia's foreign policy options over the postwar period. He himself considered that, should a nuclear war break out, ".... the only course for Australia would be to try to stay out of it [through] not [being] a worthwhile nuclear target....". Booker, M. (1976). *The last domino: Aspects of Australia's foreign relations*. Sydney: Collins. At pp. 9, 230.

¹³ Document A 1838/346: TS919/10/5, Pt. 4 [8] (7 March 1968). *Rationale of the NPT*. Canberra: Australian Archives. At p. 5. The meeting, held between DEA and ACDA in Canberra on 18 April 1968, was the pivotal point of negotiation between Australia and the US on the acceptability of the new NPT to Australia. It will be evaluated in Chapter Four. Walsh, J. (1997). Surprise down under: The secret history of Australia's nuclear ambitions. *The Nonproliferation Review*, 5 (1). [on-line]. Available: WWW: <http://cns.miis.edu/pubs/npr/walsh51.htm> At p. 15.

Nevertheless, the anti-proliferation advocates at DEA and the Department of Defence maintained their belief that Australia's best hope for long-term strategic security rested with the growing world-wide support for a treaty aimed at denying nuclear weapons to any state not yet in possession of them.¹⁴

As will be discussed later in the study, the DEA's policy success over its nuclear advocate opponents resulted in Australia exerting substantial influence over the ways in which the NPT came to be interpreted by the rest of the world. The ability of its senior anti-nuclear officers, ultimately, to prevail over Prime Minister Gorton and other nuclear champions within Cabinet, such as Minister for Defence Allen Fairhall, is a clear measure of the scale of their achievement.

The Treaty advocates at the Department of External Affairs were careful, however, to take account of the misgivings voiced by their nuclear opponents on several aspects of the Draft NPT. By doing so, they were able to reduce the potential level of resistance to the Treaty from the academic community, the general public, sections of the bureaucracy, the uranium mining industry, and state electricity generating authorities, as it gained international acceptance.

By questioning the United States on its interpretation of certain components of the Draft Treaty which it had recently negotiated with the Soviet Union at Geneva (especially the meaning of the term "manufacture" in Articles I and II, and supposed concerns from Australian uranium miners about industrial espionage by International Atomic Energy Agency inspectors) Australia gained significant international nuclear influence through the benefits of an increasingly coherent and sophisticated internal policy debate. Its stance was, effectively, neither complete agreement nor outright rejection.

Although Australia did not sign the NPT until 1970, and only ratified it in 1973, the ascendancy of the NPT advocates within DEA gave it - and Australia - the policy coherence necessary in order to apply the pressure it exerted when seeking interpretative clarity from the United States on these and other aspects of the Draft Treaty. The substantive negotiations were held in Canberra on 18 April 1968 between officers of several Australian Government Departments and a negotiating mission from

¹⁴ Evidence of the ways in which individuals (and larger groups) on both sides of the debate formulated their policy positions on the Draft NPT, and on the outcome of the controversy as reflected in Cabinet Decisions, will be taken from documents held at the Australian Archives, Canberra.

the United States Arms Control and Disarmament Agency.¹⁵ Believing that the United States was determined to obtain acceptance of the Draft NPT from every Western ally, and not only its NATO partners, Australia, in the form of the DEA, played a hard political game, indicating to Washington that the United States must do more for Australia than it had hitherto intended.

In this way, Australia left open to the United States the opportunity to negotiate acceptable interpretations of those Articles about which Australia had concerns. Diplomatic and Departmental communications between Australia and the United States in the period leading up to those negotiations had led to soundly-based confidence within DEA that the Americans would take up that opportunity.¹⁶

On the other hand, had the nuclear weapons advocates from outside the diplomatic community gained nuclear policy dominance over DEA during 1968, Australia's subsequent refusal to consider signing or ratifying a fundamentally unacceptable treaty would have resulted in severe repercussions. Not the least of these would have been a rapid loss of strategic support from its American ally, and attrition of its standing at the United Nations.

It is now clear, from documents recently released under the Australian Archives thirty-year embargo rules, that the Department of External Affairs was receiving detailed information on progress being made in negotiations at the Eighteen Nation Disarmament Committee (ENDC) at Geneva between the United States and the Soviet Union on the full Draft Text of the *Nuclear Non-Proliferation Treaty*.¹⁷

It is equally clear, from other DEA records now in the public domain, that this intelligence was *not* being transmitted by its senior officers through Minister Hasluck to the Departments of Prime Minister and Cabinet, Defence, Trade and Industry or

¹⁵ Document A 1838/346: TS 919/10/5 Pt. 7. Canberra: Australian Archives.

¹⁶ The evidence for this assertion is in the form of diplomatic cables between DEA in Canberra and Australia's overseas posts, together with DEA analysis of their content. Those posts include Embassies in Washington and London, the Consulate-General in Geneva and the Mission to the United Nations in New York.

¹⁷ Document A 1838/346: TS 919/10/5 Pt.1. Dated 18 April 1967. Canberra: Australian Archives. Marked "Secret and Guard". The member states of the Eighteen Nation Disarmament Committee are listed at Table 2, Chapter Six.

National Development, or indeed to the Cabinet itself.¹⁸ There is no obvious explanation for this omission, although one possible reason is the concerns which may have been harboured by senior DEA officers such as First Secretary Malcolm Booker over the uses to which this intelligence might have been put by the nuclear advocates, in order to reinforce their position.

The Departments of Prime Minister and Cabinet, Defence, Trade and Industry and National Development were each under the ministerial or bureaucratic direction of individuals who were strongly opposed to a moratorium on the acquisition of nuclear weapons. Detailed and updated briefings on the precise state of development of the Draft Treaty text during 1967 and 1968 would certainly have enhanced the preparations of these elements of so-called "bomb lobby" in defence of their nuclear advocacy.

In any event, as early as 18 April 1967, four months before the superpowers tabled an initial Draft Text at Geneva, DEA was aware of those of its substantive elements not disputed by the Soviet Union, of changes proposed by the United States and its NATO allies, and of those changes which the United States was considering proposing but had not yet adopted.¹⁹

Armed with this privileged information, DEA was in a position of considerable strength when compared with its nuclear advocate opponents. It maintained that position throughout the Geneva negotiating process through consistent and authoritative briefings by officers of the United States Arms Control and Disarmament Agency (ACDA) to diplomatic officers attached to Australia's Washington Embassy, and to its Geneva Consulate-General.²⁰

¹⁸ For example, see Cabinet Submission No. 47 of 4 April 1968 by the Minister for Trade and Industry, John McEwen and the Minister for National Development, David Fairbairn, headed: "Non-Proliferation - Safeguards" [on-line]. The concerns it expresses on safeguards matters suggests that its ministerial authors were not aware of DEA's on-going contact with the U.S. Arms Control and Disarmament Agency on negotiations on the NPT at Geneva. Available WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Decision_119_1.htm

¹⁹ The most important point of contention between the Soviet Union and the United States in this context was the terms of Article III concerning the application of nuclear materials diversion safeguards by the International Atomic Energy Agency. Article III was the last article to be successfully negotiated, not appearing in a Draft Text until 18 January 1968 at the Thirteenth Session of the ENDC at Geneva. Its delay represented the only significant gap in DEA's intelligence on the NPT's terms, and thus check its ability to develop a credible argument in its favour. *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). United States Arms Control and Disarmament Agency. At p. 98.

²⁰ The United States Arms Control and Disarmament Agency was the primary U.S. agency charged with undertaking the negotiating process at Geneva with the Soviet Union. Several of its officers, headed by Director William C. Foster, represented the United States at the Geneva negotiating table. *International*

As DEA's senior bureaucrats watched the treaty's text develop, they were increasingly well placed - partly as devil's advocates - to develop the full range of credible Australian (as opposed to strictly DEA-based) objections to its terms. As will be discussed below, Australia's putative determination not to accept without question the negotiated terms of the NPT, nor their initial American interpretation, eventually resulted in the visit to Canberra of a high level negotiating team from America's Arms Control and Disarmament Agency.²¹

The willingness of Washington to despatch such a mission, whose primary aim was to convince Australia of the potential effectiveness of the treaty, is itself cogent evidence of the importance which the United States Government attached to Australia's accession to the NPT.

The central struggle for policy dominance within sections of the Australian bureaucracy did not, of course, occur in a political, social or economic vacuum. In varying degree, the policy positions of the major political parties, and the relative political strength of senior Australian government figures, to be discussed below, both exercised influence over final policy outcomes.

Again, intellectual discourse, public opinion and popular debate on the NPT and other nuclear questions (such as nuclear testing), together with the economic importance and political influence of the State electricity generating authorities and the uranium mining industry, further combined to mould the context in which Australian nuclear non-proliferation policy evolved.

In addition, Australia's alliance relationship with the United States under the ANZUS Treaty, and its anxieties about the level of accession to the NPT by other nuclear weapon and "threshold" states were the predominant external factors modulating the direction of nuclear policy evolution. Each of these elements will be analysed in terms of its part in providing the background against which Australian

negotiations on the Treaty on the Nonproliferation of Nuclear Weapons. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At p. 47 *et seq.*

One example of the strength of liaison between Australian and American diplomats on NPT negotiation issues is the detailed summary of ENDC negotiations contained in Inward Cable 889 of 1 March 1968 from the Australian Embassy, Washington to DEA, Canberra. The Cable begins "Stillman (ACDA) today gave us the following information on the present position with respect to the draft non-proliferation treaty". Document A 1838/346: 719/10/6 Pt. 3. Canberra: Australian Archives.

²¹ Document A 1838/346: TS 919/10/5 Pt. 7. "Notes for use by Australian officers". Canberra: Australian Archives.

Government decisions on the 1968 *Nuclear Non-proliferation Treaty* were taken. It is sufficient here to note the extent of specifically political influence bearing on those decisions.

The single most prominent example of political influence on the bureaucratic policy debate was the nuclear advocacy of Prime Minister John Gorton, whose Ministries spanned the period during which Australia finalised its nuclear weapons policy in light of the nascent NPT.²² Gorton may ultimately be assessed as an atypical Australian political leader in his willingness to maintain policy positions in opposition to the thrust of popular and specialist opinion.²³ Certainly, it was only after his political demise, early in 1971, that the prospect of Australian nuclear power for energy and defence finally lost most of its credibility.

An important example of this tendency, in the civil nuclear field, is the history of the proposed nuclear power generating station on Commonwealth territory at Jervis Bay, N.S.W. Announced by Gorton in October 1969, the project was deferred by Prime Minister McMahon in 1971 following Gorton's removal from office on 10 March 1971. In the first half of 1972 it was deferred indefinitely on economic grounds, and the defeat of the Liberal / Country Party Coalition Government by E.G. Whitlam's Labor Party Opposition, in December of that year, spelt its demise.²⁴

Another example of individual influence on the bureaucratic debate is the surprisingly limited part played in nuclear policy formulation by the Minister for External Affairs, Paul Hasluck, who appears to have contributed little beyond his formal role as a member of the Defence and Foreign Affairs Committee of Cabinet.²⁵

²² Gorton became Prime Minister of Australia on 10 January 1968 following the disappearance and presumed death of his predecessor, Harold Holt, in the surf at Cheviot Beach, Victoria, on 19 December 1967. Gorton relinquished the post on 10 March 1971.

²³ For example, see: Fricke, G. (1990). *Profiles of power: The Prime Ministers of Australia*. Ferntree Gully: Houghton Mifflin Australia. At pp. 191 - 201: "John Gorton: Enigmatic Senator". Fricke alludes to "...the Gorton experiment of dictatorial rule..." and to charges of "inconsistency, eccentricity and dogmatism". At p. 201.

²⁴ Carr, M. (1979). *Australia and the nuclear question: A survey of government attitudes, 1945 to 1975*. Unpublished Masters thesis, University of New South Wales. Sydney: New South Wales. At pp. 146-161.

²⁵ Porter, in a political biography of Hasluck, has suggested that he was a political realist in matters of foreign affairs who inherited a clearly articulated direction in Australian external affairs policy, and as a result was content to follow that line. He could not, therefore, be regarded as an architect of Australian foreign policy. Porter also portrays Hasluck's conception of global strategic affairs as somewhat naïve in its reliance on a simple "great power" relationship model. He was, in addition, unable, Porter asserts, to

The documentary record of policy development on the terms of the Draft NPT by officers of the Department of External Affairs is almost completely devoid of policy contributions from its Minister. As a result, nuclear policy formulation within DEA enjoyed a greater measure of freedom and flexibility than many other Ministers of the period would have allowed.²⁶

Hasluck was particularly suspicious of any attempts by officers in his Department to influence his thinking on specific issues. His rigid approach to government processes and conventions led him to resist changes to policy, emanating from his Department, which did not accord with his own views.²⁷ There is no evidence, however, that this resistance occurred in respect of nuclear non-proliferation policy. Nevertheless, his reported insistence that policy decisions must be dealt with through formal written communication with his Department, rather than in personal contacts, supports the view that Hasluck did not contribute in significant ways to the process of nuclear policy development.²⁸

A third political factor - and one in need of explanation - is the muted public debate on Australia's response to the Draft NPT. Carr's assertion that "[t]here was no agitated public debate on the NPT"²⁹ is supported by the dearth of informed or detailed

develop a relationship of trust with his Department, largely as a result of his fear of being 'captured' by his own bureaucrats. Porter, R. (1993). *Paul Hasluck: A political biography*. Nedlands: University of Western Australia Press. At Chapter 10. This assessment is supported by Woodard and Beaumont's 1998 essay on Hasluck's relationship with the senior officers of the Department of External Affairs: Woodard, G., & Beaumont, J. (1998a). Paul Hasluck and the bureaucracy: The Department of External Affairs. In T. Stannage, K. Saunders & R. Nile (Eds.), *Paul Hasluck in Australian history* (pp. 143-151). St. Lucia: University of Queensland Press.

Porter also quotes M.R. Booker who, in 1968, was a First Assistant Secretary in the Department of External Affairs, as criticising Hasluck for his policy conservatism, his refusal to engage his Departmental advisers on policy development, and his insistence on decision-making based on exchanges of formal submissions. *Op. cit.* At Chapter 9: Defence and External Affairs: 'The realities of power'. At p. 275.

²⁶ One possible explanation for this apparent lack of involvement in the non-proliferation question by Hasluck may lie in a comment by Eric Walsh (1969, February 22) *The Nation*, p.7:

Mr Hasluck, in his five years as foreign minister, had an almost total pre-occupation with China and Vietnam in our own region.

Cited in: Woodard, G., & Beaumont, J. (1998b). Paul Hasluck as Minister for Foreign Affairs: Towards a reappraisal. *Australian Journal of International Affairs*, 52 (1), pp. 63-75. At p. 64.

²⁷ *Supra.* At Note 25 (1993), pp. 275, 276.

²⁸ *Ibid.*

²⁹ *Op. cit.* At Note 10, p. 141. There is more evidence of popular debate on the question of signing the NPT after its opening for signature on 1 July 1968, when Australia's opportunity for direct influence on

discussion and analysis in the popular press and academic literature, and an absence of evidence of organised special interest group resistance.³⁰ As this chapter will show, each of these factors contributes to the context in which the process of nuclear policy formulation developed within the Australian bureaucracy in response to the NPT negotiations.

At the most general level of analysis, the policy planners within DEA were faced with a stark choice. Put simply, they had to weigh the desirability of Australia's support for the proposed multilateral nuclear non-proliferation treaty against the alternative course of action - the nuclear weapons option.

All policy participants within government accepted without question the need to observe strict security protocols in their consideration of issues of fundamental national interest.³¹ That requirement, reinforced by the draconian secrecy provisions and penalties of the *Atomic Energy Act* (Cth) 1953, was a major element in the success of the claim of senior officers within DEA, a small, closed group of policy specialists, for policy dominance - and ultimately policy ownership - in nuclear non-proliferation affairs. It also contributed to the limited degree to which they had to take account of the domestic political, economic and social (essentially non-specialist) effects of their policy positions, a shortcoming that is clear from the documentary evidence of their deliberations.

The Nuclear Weapons Option.

The nuclear weapons option is a thread which runs through the history of Australia's engagement with nuclear policy from the early post-war years following initiation of

its initial interpretation had passed, than in the period leading up to that date. Prime Minister Gorton spurred the debate in his speech of 9 October 1969, which initiated the Coalition's re-election campaign. In it, he asserted that, in the absence of major changes, Australia would *not* sign the NPT. Five months later, his Government signed the Treaty. *Op. cit.* At Note 7, p.16.

³⁰ One example from the Australian mass communications media of the lack of informed public debate on nuclear non-proliferation is provided by a review of *The Australian* newspaper. In the two months leading up to the opening for signature of the NPT on 1 July 1968, fewer than ten references, of any kind, to the treaty appear - of which none can reasonably be described as a thorough analysis of its implications for Australia. By contrast, the war in Vietnam figures prominently in each issue.

³¹ The documentary evidence held by the Australian Archives in Canberra, and used in the study, carries security classifications ranging from "Unrestricted" to "Secret and Guard".

prospecting for uranium ores in the Northern Territory until Australia's ratification of the NPT on 29 January 1973. At various times during that period, influential figures within scientific and government circles favoured, advocated and sought the acquisition of a credible and independent Australian nuclear deterrent. In short, they wanted "the Bomb".

While the details of their position are elaborated later in this chapter, it is necessary here to establish the general characteristics of their position. The choice faced by all industrially advanced states in the nuclear era has been precisely that which exercised the minds of nuclear policy planners within DEA during 1967 and 1968. Should Australia make every effort to acquire nuclear weapons (or the ability to manufacture them quickly) in the shortest possible time, or should it decide not to acquire them?

The first option has, for states, been accompanied by political and strategic judgments about the effect of acquisition on existing alliances and regional balances of power, and the actual deterrent effect of nuclear weapons against nuclear and non-nuclear threats. For Australia, the strategic judgment was clearly outlined in a DEA policy position paper on the "rationale" behind the NPT, dated March 1968:

The question is often asked whether, when the moment of crisis arrives, a major nuclear power would risk retaliation on itself by coming to the aid of a non-nuclear power under threat from another nuclear power. Would the United States, for example, risk San Francisco for Sydney?³²

It notes further, with respect to threats to Australia's strategic interests in South East Asia and Papua/New Guinea, that:

Activity at [the level of subversion, infiltration, insurgency and "confrontation"] is below the nuclear threshold and cannot be deterred by a nuclear capability.³³

Implicit in both options (at least until the advent of the NPT in 1968) has been a judgment about the relative merits of questionable security enhancement *versus* further nuclear proliferation. The same paper comments:

³² Document A 1838/346: TS 919/10/5, Pt. 4. Canberra: Australian Archives. At pp. 5, 6. Top Secret Austeo.

³³ *Ibid.* At p. 5.

In respect of no established nuclear power nor any power of advanced nuclear development could Australia expect to establish a credible deterrent.³⁴

Before addressing the option of nuclear abstinence, it is necessary to review Australia's actions in regard to the nuclear weapon alternative. This will help to build a balanced picture of the process of Australia's nuclear policy consolidation (and the eventual renunciation of the nuclear weapons option) by establishing the limits of the debate on both sides of the question.

Until comparatively recently, the extent of Australia's interest in acquiring deliverable nuclear weapons in the period from 1956 to 1972 has not been well known or understood.³⁵ Nor has the ambiguity displayed by Australia in its nuclear policy pronouncements over the twenty years between the inception in 1952 of British nuclear testing in Australia, and this country's ratification of the NPT in 1973.³⁶ That position is now changing.

Walsh has asserted that Australia secretly attempted to acquire nuclear weapons (and the means to deliver them) either through procurement from the United States and the United Kingdom, or by developing an indigenous manufacturing capacity, over the entire period from 1956 to 1972.³⁷ That claim is supported by new evidence which shows that elements within the Australian government continued seriously to consider the desirability of an independent nuclear deterrent force even as Western, Soviet and non-aligned support for a global non-proliferation treaty hardened during the 1960s.

One example is a study by the Joint Planning Committee (JPC) of the Department of Defence which, in February 1968, concluded an examination of the extent to which Australia could rely on United States protection in various circumstances, together with the credibility of an Australian nuclear capacity.³⁸ The

³⁴ *Ibid.*

³⁵ *Supra.* At Note 13.

³⁶ Britain tested twelve nuclear devices on Australian territory between 13 October 1952 (at the Monte Bello Island site in Western Australia) and 14 September 1957 (at the Maralinga site in South Australia). Carr, M. (1979). *Australia and the nuclear question: A survey of government attitudes, 1945 to 1975*. Unpublished Masters thesis. Sydney: University of New South Wales. At pp. 42, 69-73.

³⁷ *Supra.* At Note 13, pp. 2-17.

³⁸ Document A 1838/346: TS 919/10/5, Pt. 1. (July 1967). *"Headings of an External Affairs paper on Australian acquisition of nuclear weapons"*. Classified 'Top Secret'. Canberra: Australian Archives.

study incorporated a contribution from DEA on the benefits of signing the NPT, and the JPC's conclusion - perhaps surprising in a Department of Defence strategic policy document - was that "Australia should be prepared to sign such a treaty".³⁹ That outcome augured well for DEA's eventual policy predominance, although, in reaching its conclusion, the Defence Department was prepared carefully to consider the feasibility and strategic effects of an independent nuclear capability.

While support for the principles of nuclear non-proliferation began to grow at the United Nations during the early 1960s (in the form of repeated General Assembly Resolutions calling for a global agreement) the earliest *public* indication that Australia intended to keep its nuclear options open is contained in a letter dated 15 March 1962 from Minister for External Affairs, Garfield Barwick, to the Acting Secretary-General of the United Nations.⁴⁰

The Acting Secretary-General had sought the views of the Australian Government on the conditions under which Australia, a country "not possessing nuclear weapons", might agree to refrain from "manufacturing or acquiring ... [nuclear] weapons and ... refuse to receive in the future nuclear weapons on [its territory] on behalf of other countries."⁴¹

In reply, Barwick acknowledged the dangers inherent in nuclear proliferation, quoting Prime Minister Menzies to that effect in a speech to the House of Representatives on 19 September 1957. Nevertheless, he went on to assert "the right of nuclear powers [to station] their nuclear weapons wherever military necessity requires."⁴² Barwick then stated clearly that "Australia *cannot undertake* that in no circumstances will Australian forces in the future be armed with nuclear weapons" (emphasis added), justifying that stance largely in terms of "the emergence in the area

³⁹ *Supra*. At Note 13, p.15.

⁴⁰ Document A 1838/346 TS 919/10/5 Pt. 1. Canberra: Australian Archives. UN Document UNGA 20/Item 28. Annex. The request of the Acting Secretary-General was made in response to UNGA Resolution 1664 (XVI) of 4 December 1961.

⁴¹ *Ibid*.

⁴² *Ibid*. Menzies had stated, in part, that "There is advantage for the world in having nuclear and thermo-nuclear weapons in the hands of the United States, the United Kingdom and the Soviet Union, and in no other."

of East Asia and the Western Pacific of a military force of great dimensions and some ambition."

It appears, from the language used at this point, that Barwick was referring here to the emerging (non-nuclear) military strength of the People's Republic of China. Barwick also justified Australia's refusal to guarantee non-acquisition of nuclear weapons on the grounds that any non-proliferation treaty not encompassing the (then) nuclear powers - the US, the Soviet Union, the United Kingdom and France - was doomed to failure, and that nations must be at liberty to seek their own security in accordance with Article 51 of the U.N. Charter.⁴³

These sentiments are echoed by evidence which has recently emerged from those Australian Departments with either an interest in peaceful nuclear energy development or concern over perceived Australian military weakness.⁴⁴ The most forceful display of resistance to the proposed NPT came from the Australian Atomic Energy Commission (AAEC), an instrumentality of the Department of National Development. The AAEC line was followed, not surprisingly, by elements within the defence establishment, most notably the Royal Australian Air Force and senior military and bureaucratic figures within the Department of Defence,⁴⁵ and by elements within the Department of Supply. This group constituted, by the late 1960s, what became known in Australian government circles as a "bomb lobby" group; an unofficial policy support structure behind Barwick's earlier, publicly expressed position.⁴⁶

In the public domain, its members included Prime Minister Gorton and his Minister for Social Security, W.C. Wentworth, and several right-wing Liberal Party ministers and backbenchers, consistently supported by the Democratic Labor Party.⁴⁷

⁴³ *Ibid.*

⁴⁴ Departments with an interest in nuclear matters were not confined to those concerned with national security and defence, but included those with responsibilities for economic and technical development. The role played by the Departments of National Development, Trade and Industry, and Supply in the nuclear policy process will be discussed below.

⁴⁵ *Supra*. At Note 13. According to Walsh, one leading nuclear exponent within the Defence establishment was the Secretary of the Defence Department, Sir Henry Bland, whom he reports as supporting Baxter (the head of the Australian Atomic Energy Commission) in the Cabinet Defence Committee. Bland was opposed to Australia signing a nuclear non-proliferation treaty, and "attempted to steer the [Committee] discussions accordingly". At p. 15.

⁴⁶ *Supra*. At Note 5 (2000), pp. 8-13.

⁴⁷ Encel, S. & McKnight, A (1970). Bombs, power stations, and proliferation. *The Australian Quarterly*, 42 (1), pp. 15-26. At p. 15. Cawte, A. (1992). *Atomic Australia*. Kensington: University of New South Wales Press. At p. 117.

The essential elements of the bomb lobby's case are contained in two letters written by one of its senior members, Minister for National Development, David Fairbairn, to the Minister for External Affairs, Paul Hasluck and Prime Minister John Gorton, on 16 May 1967 and 16 February 1968 respectively.⁴⁸ Concerned over earlier negotiations⁴⁹ between the United States and the Soviet Union on a non-proliferation agreement at the Eighteen Nation Disarmament Committee at Geneva, Fairbairn drew Hasluck's attention to the "profound and unfortunate implications" of Australian accession to a non-proliferation treaty which was, he stated somewhat ambiguously, "in any way acceptable to the U.S.A."

His *prima facie* concern, as Minister for National Development, was for the prospects for development of nuclear power generation capacity, and its associated technology, in Australia. As signatory to the proposed treaty, Australia would, to its detriment, come under an international regime of "supervision and control" over its nuclear activities, defined by Fairbairn as "...the mining and treatment of uranium and thorium ores, fuel fabrication, reactors (construction and operation) and fuel processing...".⁵⁰

Since it is accepted universally (and implied by the terms of Article III of the NPT) that the fission technology necessary for both nuclear power generation and nuclear weapons manufacture are functionally indistinguishable, Fairbairn's omission of nuclear weapons from his list of Australia's nuclear activities does not exclude possible weapons manufacture from his argument.⁵¹ Nor does Australia's lack, at that time, of a power or production reactor capable of producing fissile material, since none is needed to enrich its natural uranium reserves to produce a supply of weapons-grade

⁴⁸ Documents A 1838/346: TS 919/10/5 Pt. 1 and A 1838/346: TS 919/10/5 Pt. 2, respectively. Canberra: Australian Archives. Both documents are marked "Top Secret".

⁴⁹ *Supra*. At Note 20. It appears, especially from the level of urgency clearly evident in his second letter to Gorton, that Fairbairn had access to the detailed information on NPT negotiations being supplied to the Department of External Affairs. The source of that information is not known to this writer. Australia was not a member state at the ENDC.

⁵⁰ *Supra*. At Note 48.

⁵¹ An authoritative and non-technical explanation of the link between peaceful and non-peaceful nuclear technologies is provided in Titterton, E.W., & Robotham, F.P. (1979). *Uranium: Energy source for the future?* Melbourne: Abacus. At Chapter 10: "Proliferation and Terrorism."

material with enhanced levels of the fissile isotope of uranium, U-235.⁵² On the latter point, in 1967 Fairbairn had announced a decision to quarantine half of Australia's future uranium ore discoveries from export, as part of a policy to ensure sufficient future stocks of uranium (as he later informed the House of Representatives) "for use in atomic weapons as well as for power generation".⁵³

In his later letter to Prime Minister Gorton, Fairbairn struck a more urgent note. With the increasing certainty of the presentation of a draft of the new treaty to the General Assembly at an early date, he cautioned his new Leader to "move slowly in this matter and delay for a considerable time signing the Treaty, *or perhaps not ... sign it at all*". (emphasis added)⁵⁴ Reiterating his earlier themes, Fairbairn referred to the likelihood that a wide range of Australian mining operations, as well as work on uranium enrichment then being undertaken by the Australian Atomic Energy Commission, would come under the direction and control of the International Atomic Energy Commission's Inspectorate of Safeguards.⁵⁵

Such an outcome would, in Fairbairn's view, seriously compromise Australia's prospects for nuclear energy production - and, by implication, weapons development - by opening all its relevant laboratories and production facilities to the scrutiny of I.A.E.A. inspectors, some of whose security credentials could not be guaranteed. While not explicitly stating that such an outcome would jeopardise Australia's ability to acquire nuclear weapons, Fairbairn noted that "...this would appear to negate the *long-standing policy* of the Commonwealth of not surrendering its nuclear options". (emphasis added)⁵⁶

Here the "bomb lobby" case rested. Its opportunity to prevail came when two of its members were represented on the senior level Working Group, comprising representatives from five government Departments, which reported to the Defence

⁵² *Ibid.* At p. 102. The enrichment process, involving gaseous diffusion, centrifugation, or possibly laser separation would, however, be extremely expensive.

⁵³ *Commonwealth Parliamentary Debates, Hansard/House of Representatives* 54: 13 April 1967. Canberra: Commonwealth Parliament. At p. 1214.

⁵⁴ *Supra.* At Note 48.

⁵⁵ *Ibid.* At p.2.

⁵⁶ *Ibid.*

Committee on the implications of the NPT on 18 March 1968.⁵⁷ The Working Group's central recommendation to Cabinet would demonstrate the failure of the hard-line nuclear advocates (especially those at the Australian Atomic Energy Commission) to carry their views. Paragraph 90 of the Working Group's report recommended that Australia should:

Indicat[e] a willingness to sign the Treaty subject to understandings, qualifications and possible amendments.⁵⁸

The Department of Supply and the Australian Atomic Energy Commission (AAEC) were called on to include in the Report an annex on the expected costs of a nuclear weapons programme. They suggested that a programme sufficient to produce 30 low-yield nuclear fission weapons per annum could be expected to cost an initial \$A144 million (in same year dollars), with on-going annual costs of \$A13 million for plutonium production. Alternatively, ten thermonuclear devices (hydrogen bombs) of far greater power could be produced for around \$A184 million. In both cases, delivery systems were not considered.⁵⁹

While they made no comment on the economic effects for Australia of such a cost burden, the Department of Supply and the AAEC noted that "weapons manufacture is no longer beyond the economic, technical and industrial capacity of the smaller advanced countries".⁶⁰

These, then, were the essential components of the "bomb lobby" argument by early 1968. They can be summarised as a combination of deep concern over Australia's medium-to-long term strategic security position, suspicion over the terms of the NPT affecting Australia's nuclear options (in both energy production and defence) and, finally, a conviction that Australia's accession to such a treaty was both dangerous and avoidable.

⁵⁷ Document A 1838/346: TS 919/10/5 Pt.5. Canberra: Australian Archives. Marked "Top Secret". It comprised representatives from the Departments of Defence, Supply, Treasury and External Affairs, and the Australian Atomic Energy Commission.

⁵⁸ *Ibid.* At p. 35.

⁵⁹ *Ibid.* At Annex 'B'.

⁶⁰ *Ibid.*

The Nuclear Abstinence Option

The alternative course for Australian nuclear policy, a decision to renounce nuclear weapons and work for their extinction, is as durable a thread running through Australia's nuclear policy as is the nuclear weapon option. It is the second component of its nuclear ambiguity, but one far more consistently and clearly on public display at the United Nations and other international fora than at home. Its presence is a clear indication of the strength of concerns over nuclear proliferation which have existed in Australia over the entire nuclear era, notwithstanding the persistence of nuclear advocates in the "bomb lobby".

One early example is the strong support shown by the post-war Chifley Labor administrations, from July 1945 to December 1949, for international nuclear control measures. Chifley's Minister for External Affairs, Dr. H.V. Evatt, had vigorously championed the United States' ill-fated 1946 "Baruch Plan" for international control of nuclear energy while Chairman of the short-lived United Nations Atomic Energy Commission.⁶¹

Nor was early anti-nuclear idealism confined to the Australian Labor Party. In 1957, the Liberal/Country Party Coalition government led by Robert Menzies had supported the so-called "Irish Resolution" at the United Nations, the first of many annual General Assembly Resolutions calling for an international agreement to stem the proliferation of nuclear weapons.⁶²

Another early and important example of its concern for the implications of global nuclear proliferation was the active role played by Australia in the preparation of the Draft Statute of the International Atomic Energy Agency (IAEA) from 1953 to 26 October 1956, when the Statute was opened for signature.⁶³ Australia's association with the IAEA's nuclear safeguards work extends from the 1956 Conference on the Draft

⁶¹ Greenwood, G., & Harper, N. (Eds.).(1957). *Australia in world affairs 1950-1955*. Melbourne: F.W. Cheshire. At p. 104. For an extensive analysis of the ill-fated Baruch Plan see: Maddock, S.J. (1997). *The nth country conundrum: The American and Soviet quest for nuclear nonproliferation, 1945-1970*. Doctoral dissertation, University of Connecticut. *Dissertation Abstracts International*, 58 . 06A, 2362. At Chapters 3, 4.

⁶² Tooth, G. (1987). *Australia and the treaty on the non-proliferation of nuclear weapons: 1968 - 1972*. Unpublished Honours thesis, University of Tasmania. Hobart: University of Tasmania. At p.8.

⁶³ Carr, M. (1979). *Australia and the nuclear question: a survey of attitudes, 1945 to 1975*. Unpublished Masters thesis, University of New South Wales, Sydney, New South Wales. At p. 115.

Statute to the present day, and includes involvement in the development of the enhanced safeguards system called for in Article III of the NPT. As the most technologically advanced state in the so-called "Oceania" region, Australia has been a member state on the Board of Governors of the Agency continuously from 1957, and has also provided expert personnel as Safeguards Inspectors.⁶⁴

Furthermore, by 1964 Prime Minister Menzies felt able to respond to an Indonesian claim that Australia was developing nuclear weapons by asserting in the House of Representatives that:

...Indonesia, like Australia, is a signatory to the partial nuclear test ban treaty and is therefore, with us, involved in a state of affairs in which ... we do not want to see the spread of atomic weapons beyond those countries in which they now exist.⁶⁵

From the perspective of a dispassionate observer, these early nuclear policy positions are, *prima facie*, those of a Western constitutional liberal democracy whose government is accountable to its people. They reflect a deep concern for the implications of a global nuclear future in which many states possess nuclear weapons. On the other hand, a more suspicious or informed observer might be forgiven for viewing them with scepticism.

These examples of public Australian government endorsement of nuclear non-proliferation principles surely led their many advocates around the world (including the United States Government) to expect that Australia would continue in the same vein during the negotiations on the terms of the NPT. Negotiations had, after all, begun in the Eighteen Nation Disarmament Committee at Geneva as early as February, 1964, as Prime Minister Menzies sought to placate Indonesian nuclear fears.⁶⁶ Such expectation appeared to be confirmed by two separate statements made in October 1965 and

⁶⁴ Biggs, I. (1999). National viewpoints: Views on strengthened safeguards from Australia, Cuba & South Africa: Australia: Solidifying support. *IAEA Bulletin*, 41 (4), 24-26. At 24. The original Safeguard system was modified, using bilateral agreements between states and the IAEA, in response to the requirements of the NPT after 1968. See Appendix III.

⁶⁵ *Commonwealth Parliamentary Debates, Hansard House of Representatives* 44, 16 November 1964. Canberra: Commonwealth Government Printing Office. At p. 2976.

⁶⁶ *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). United States Arms Control and Disarmament Agency. Washington, D.C.: U.S. Government Printing Office. At p. 9.

November 1966 in the First Committee of the General Assembly by the leader of the Australian Delegation, Sir James Plimsoll. On both occasions, Plimsoll emphasised the importance and urgency of measures to restrict the spread of nuclear weapons.⁶⁷

Certainly, by 26 March 1968 - as United States negotiators at Geneva continued to provide Australian diplomats with regular updates on progress being made with the Russians on the terms of the NPT - the United States Government would have been encouraged to hear the External Affairs Minister, Paul Hasluck, state in the House of Representatives:

The Australian Government has consistently seen the dangers inherent in the proliferation of nuclear weapons and in the increase in the number of nations possessing such weapons. We therefore fully share the hope that effective measures will be found to prevent such further spread of nuclear weapons. We also share the hope that this proposed treaty may become such an effective measure.⁶⁸

Here, however, Australia's ambivalent policy on nuclear weapons acquisition was clearly evident. As noted above, former Minister for External Affairs Barwick, when called on in 1962 to clarify Australia's nuclear weapons policy by the Acting Secretary-General of the United Nations, had refused to eliminate the possibility that Australia might in the future acquire nuclear weapons.⁶⁹ That policy position had never been explicitly repudiated in a public forum.

As a result, those officers in the United States Arms Control and Disarmament Agency with responsibility during 1967 and 1968 for dealing with Australian concerns over the NPT could be forgiven, in the light of Hasluck's March 1968 statement, for accusing Australia of prevarication, if not dissembling, when, on 1 July 1968, it refused to sign the Treaty.

The Domestic Policy Context

As noted above, the debate on the NPT within the Australian bureaucracy was coloured and informed by a range of external influences, both domestic and international. On the

⁶⁷ *Supra*. At Note 63, p.9. Plimsoll held the post of Permanent Secretary at the Department for External Affairs from 1965 to 1970.

⁶⁸ *Commonwealth Parliamentary Debates, Hansard House of Representatives* 58, 26 March 1968. Canberra: Commonwealth Government Printing Office. At p. 455.

⁶⁹ *Supra*. At Note 40.

domestic political scene, the Australian Labor Party, led from 8 February 1967 by E.G. Whitlam, provided an increasingly sceptical and intellectually rigorous critique of the Coalition government's incoherent nuclear policy positions.

The ALP had overseen the early post-war search in Australia for uranium deposits as part of Australia's contribution to the defence of the Western Alliance.⁷⁰ Out of government from 1949 until Whitlam's victory in the Federal election of 5 December 1972, the Australian Labor Party had progressively modified its nuclear policy platform.⁷¹ The keystone of its policy was made clear by the instruction from its 24th Commonwealth Conference in 1961 to the Federal parliamentary Labor Party to work towards "high level political talks aimed at the effective prevention of the use of nuclear devices by any nation, whether for peace or war".

However, while the ALP had supported the notion of a nuclear-free zone in the Southern Hemisphere as early as 1963, its non-proliferation credentials were not helped by Whitlam's attempt, in the Roy Milne Memorial Lecture of 1963, to clarify ALP policy on the issue when he said:

Only if [a nuclear-free zone conference] could agree to a watertight arrangement would Australia agree not to manufacture, acquire or receive nuclear weapons.⁷²

In fact, only in August 1969 did the alternative Australian government make its position on the NPT clear. In the House of Representatives, Whitlam called for signature of the treaty on the basis of its promised benefits for Australia's nuclear power generation plans, while emphasising that Australia should not attempt to influence other states in the region to sign.⁷³

The only other political party with strong views on nuclear matters, the small but electorally significant Democratic Labor Party, continued its unequivocal commitment to an independent Australian nuclear deterrent. Its animus towards the Australian Labor Party, and its ability to decide the passage of the Government's

⁷⁰ *Supra*. At Note 63, p. 19.

⁷¹ *Ibid*. At p. 102.

⁷² *Op. cit*. At Note 63, p.112.

⁷³ *Ibid*. At p. 139.

legislative programme in the Senate, gave the DLP special significance in the political calculations of both Coalition Parties.⁷⁴

Popular Debate

The desultory nature of the Australian nuclear debate at the political level was echoed by the lack of popular awareness of, or interest in, the range of issues which the emergent NPT raised for Australia. One strong indicator of this phenomenon is the lack of evidence in Australia's only national broadsheet daily newspaper, *The Australian*, of popular debate on nuclear issues during the final two months leading up to the inception of the treaty. Few direct references to the treaty exist, either as letters to the editor, news reports or feature articles, and then only in conjunction with the broader issues of defence equipment procurement then current.

It is significant that no thorough analysis of non-proliferation issues relevant to Australian nuclear policy appeared in the mass communication print media at a time when the terms of the NPT were being debated in the General Assembly of the United Nations. Only after the debate had concluded, and the terms of the NPT had been endorsed by the international community at New York,⁷⁵ did recognition of its implications become evident.⁷⁶

Similarly, academic and specialist interest in nuclear questions generally, and in nuclear non-proliferation in particular, was muted. Measured by the extent of research

⁷⁴ Richardson, J. L. (1968). *Australia and the Non-Proliferation Treaty. Canberra papers on strategy and defence, No. 3.* Canberra: Australian National University. At p. 2. The DLP, a conservative, Catholic-influenced breakaway group from the Australian Labor Party, directed its electoral preferences to Liberal Party candidates in all federal elections after 1954 - until its demise in the early 1970s. It also held the balance of power in the Senate until the election of the Whitlam Labor Government in 1972, thus exercising considerable influence in Australian political life. Bolton, G. (1988). *The middle way: Volume 5 of the Oxford history of Australia.* Melbourne: Oxford University Press. At pp. 139-148.

⁷⁵ General Assembly Resolution 2373 (XXII) of 12 June 1968 was adopted by the plenary General Assembly by a vote of 95 to 4, with 21 abstentions. Those in favour included the United States, the Soviet Union, the United Kingdom, and 11 other members of the ENDC. Albania, Cuba, Tanzania and Zambia voted against, while Brazil, Burma, France, India and Spain were among those abstaining. Arms Control and Disarmament Agency (1969). *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons.* Washington, DC: United States Arms Control and Disarmament Agency. At p. 125.

⁷⁶ For example: Kilpatrick, C. (1968, June 14). LBJ flies to UN to hail nuclear treaty. *The Australian*, p.1; Halloran, R. (1968, June 24). Japan will not sign the nuclear ban treaty. *The Australian*, p. 5; Russia offers to talk on missiles: "We want to add realism to the non-proliferation pact". (1968, June 28). *The Australian*, p.1.

papers, articles and longer works published in Australia on these issues prior to 1969, the research effort can only be described as fragmented and sparse.⁷⁷

The academy's influence on nuclear decision-making within government (with the possible exception of the public writings of Sir Philip Baxter)⁷⁸ was correspondingly low. With the notable exceptions of short, but authoritative, articles on the implications of the NPT for Australia by Bull⁷⁹ and Titterton,⁸⁰ no thorough analysis of the possible effects of the treaty existed in Australia, *outside government*, prior to its opening for signature. As a result, government-based deliberations on the NPT (and on wider nuclear questions) were unencumbered - and uninformed - by any need to take external opinion, whether public, specialist or academic, seriously into account.

The State Energy Authorities

A second issue beyond the internal government debate on the defence implications of nuclear power involved the question of introducing nuclear power generating capacity in Australia during a period of rapidly rising demand for electricity, and deep concern over the long-term future of conventional fuel supplies.⁸¹ Given the dual and indivisible

⁷⁷ The review of relevant literature in the Introduction to this study contains a critique of the extent of Australian scholarship on the questions and issues implicit in the NPT, and in nuclear non-proliferation and nuclear arms control more generally.

⁷⁸ Baxter (who was Vice-Chancellor of the University of New South Wales from 1955 to 1969) is widely believed to have been the author of an article published in the Australian monthly journal *Quadrant* in its May/June 1968 issue, under the pseudonym "X". Its title "Australian Doubts on the Treaty" points to its strong opposition to the NPT (on the grounds of its ineffectiveness, and its technological, economic and military implications for Australia). X. (1968). Australian doubts on the treaty. *Quadrant*, 12, pp. 30-34. Encel, S. & McKnight, A. (1970). Bombs, power stations, and proliferation. *The Australian Quarterly*, 42 (1). pp. 15-26, at p. 21.

⁷⁹ Hedley Bull's view was that Australia should adopt a favourable attitude to the NPT, based on his assessment of Australia's national interest in slowing the spread of nuclear weapons. He also believed that Australia's support of such a joint US/Soviet initiative would be to its long term advantage, and that Australia should develop nuclear power generation as insurance against the possible need to develop indigenous nuclear weapons, should US nuclear protection no longer be forthcoming. Bull, H. (1968). The Non-Proliferation Treaty and its implications for Australia. *Australian Outlook*, 22 (2). pp. 162-175.

⁸⁰ Titterton, E.W. (1968). Australia's nuclear power. *Quadrant*, 12, pp. 57-63.

⁸¹ One of the most authoritative, if polemical, works on the cases for and against nuclear power as a viable long-term energy alternative is: Titterton, E. W., & Robotham, F. P. (1979). *Uranium: Energy source for the future?* West Melbourne: Thomas Nelson Australia.

nature of nuclear technology when applied to either power generation or nuclear weapons, it was inevitable that the two questions would become closely linked.

Accession by Australia to the NPT would mean that all nuclear installations, including those ostensibly for use only for electrical power generation, would immediately become subject to diversion safeguards monitoring by inspectors from the International Atomic Energy Agency, as required by Article III. As a result, any attempt to divert fissionable material from a power generation application to weapons use was almost certain to be detected.

By 1968, all Australian state electricity generating authorities had addressed nuclear power as a possible alternative to conventional energy sources. Their interest had been stimulated by the seemingly inexorable rise in demand for electrical power which, by 1968, had seen them "racing against time to install additional generating plant capacity".⁸²

One representative example of the degree of interest in nuclear power among the states, an interest which helped to generate its legitimacy at the federal level, could be seen in Western Australia, which had experienced a rapid acceleration of demand for electrical power, driven largely by industrial expansion and the cost pressures associated with meeting that demand.⁸³ Since Western Australia then possessed less than three per cent of Australia's total reserves of readily accessible fossil fuels, and was experiencing *per capita* energy consumption some 15% greater than the national average (with a 70% dependence on oil fuels) it is not surprising that it should look to nuclear power for salvation.⁸⁴

⁸² The race for power: It's an inter-state struggle for the best and the cheapest. (1968, June 18). *The Australian*, p. 4. The Chairman of the New South Wales Electricity Commission asserted in 1968 that his state needed to almost double its generating capacity by 1975 in order to satisfy a compound growth rate of around ten per cent per annum. Coady, A. W. (1968, June 18). Face it! We'll have to wait years for that N-power. *The Australian*, p.3.

⁸³ The strength of this phenomenon can be gauged from the Annual Report of the State Electricity Commission of Western Australia for 1971, which reported a 12 % growth in the electrical distribution system of Western Australia in the five years between 1966 and 1971. Given the contemporaneous level of growth in demand, the Report estimated that Western Australia must double its generating capacity approximately every six years. State Electricity Commission of Western Australia. *Annual report, 1971*. (1971) Perth: Author.

⁸⁴ These figures are taken from the Annual Report of the State Energy Commission of Western Australia for 1977. However, it is unlikely that they would have altered substantially in the nine years from 1968 to 1977, especially in terms of *per capita* energy consumption, since this was substantially a function of the energy consumption of the many large mining and mineral processing projects then under way in the state (whose life extended beyond 1977), and of the expense involved in the delivery of energy over great distances. State Energy Commission of Western Australia. *Annual report, 1977*. (1977). Perth: At p. 7.

Early enthusiasm for nuclear power generation was, however, tempered in all states by the economic realities involved. As it became clear to the various state energy generating authorities, and their political masters, that nuclear energy was not, nor likely to become, the promised source of cheap and abundant energy, interest began to wane.

The state energy generating authorities maintained a watching brief for most of the succeeding decade, hoping for new nuclear technologies promising more viable economics. Nevertheless, in 1968 - arguably the zenith for any politically acceptable national nuclear power generation policy - the unit cost of producing energy from nuclear fuels in Australia simply could not compete with that of fossil fuels.⁸⁵ While Australia possessed large reserves of uranium ore, its local enrichment to a form usable in the newer, more technologically advanced fast breeder reactors, was still many years away, forcing projected reliance on overseas fuel suppliers. Even up to 1975, the technological characteristics of individual nuclear power plants precluded their use by state energy authorities, since the smallest reactor with any chance of economic viability was, at 600 - 700 MW output, rated at around twice the usable capacity of the state electricity grids.⁸⁶

As a result, the prospective advantages which a nuclear non-proliferation treaty promised for peaceful-use power generation in Australia were easily exaggerated. At least in the short term, nuclear power generation throughout Australia appeared set to remain at the preliminary planning stage, making concerns about international inspection of nuclear facilities largely moot. While the ill-fated Jervis Bay 500 MW nuclear power plant project began, in October 1969, as a combined AAEC and Gorton initiative aimed at introducing commercial nuclear power generation into Australia, it is unlikely that even the N.S.W. electricity grid, the largest in the country, could have

⁸⁵ One of the most significant long-term costs of nuclear power generation, and one unique to it, is the cost associated with the de-commissioning of generating plants. These costs, which form part of the total costs of ownership of nuclear generation capacity, have been estimated to be at least US \$100 million (in 1979 dollars). for each nuclear generating station in the United States. Robotham, F. P. (1979). The case against. In E. W. Titterton & F. P. Robotham, *Uranium: Energy source for the future?* (pp. 112-194). At p. 162.

⁸⁶ This was certainly the case in Western Australia, whose State Electricity Commission initiated a preliminary study of the feasibility of nuclear power generation. The Report concluded that a nuclear power generation reactor unit would only be economically viable if around half its output of super-heated, high pressure steam could be sold for immediate use in an adjacent manufacturing process. Burmot Australia Pty Ltd. (1975). *Preliminary feasibility study of nuclear power plant with process steam generation*. Sydney: Author. At pp. 2-3.

accommodated a single generating unit of that size. Thus, the aspirations of the Gorton Government for a significant nuclear power generation industry in Australia, while creating tensions with at least one state Coalition government,⁸⁷ were never built on solid ground. Any concerns which Prime Minister Gorton, Minister for National Development Fairbairn, or Minister for Defence Fairhall may have felt, during early 1968, over the impact of the NPT were, at least on this issue, unfounded.

Nevertheless, the states continued to monitor the development of nuclear power generation technologies for several years. Only after 1979 did the State Energy Commission of Western Australia appear to abandon its nuclear power generation planning option.⁸⁸

The Uranium Mining Industry

A further factor to be considered in the domestic context of Australia's nuclear policy debate, in the months leading up to the opening of the NPT, is the influence of the uranium mining industry. The potential value of Australia's uranium deposits, both in financial and political terms, is immense. With approximately 30 per cent of the world's low-cost reserves, Australia is currently the third largest exporter of uranium ore concentrates, having exported 5,989 tonnes of "yellowcake" (uranium oxide) in the 1998-1999 financial year.⁸⁹ Moreover, 339 of the 434 power reactors in operation around the world in that year were operated by countries to which Australia supplied uranium. These reactors produced 13 per cent of the world's total electricity output.⁹⁰

In the middle years of the nineteen sixties, however, the uranium exploration and mining industries were at a low ebb, not helped by Minister for National Development Fairbairn's 1967 export embargo. The early post-war boom in uranium

⁸⁷ In Western Australia, Premier Sir Charles Court has stated that he experienced considerable difficulty in his dealings with the Federal government over nuclear power generation planning, citing the Federal Government's "exclusive" authority over all nuclear affairs [as evidenced by the 1953 *Atomic Energy Act* (Cth.)]. Sir Charles Court, personal communication, 14 June, 2000.

⁸⁸ Boylen L., & McIlwraith, J. (1994). A history of gas and electricity in Western Australia. In D. Gladwell, (Ed.), *Power for the people*. Perth, W.A.: State Energy Commission of Western Australia. At p. 70.

⁸⁹ *Australian Safeguards and Non-proliferation Office: Annual Report 1998-99*. (2000). ASNO.[Online]. Available:WWW:http://www.asno.dfat.gov.au/annual_report_9899/bkg_aust.html .

⁹⁰ *Ibid.*

exploration, stimulated by its apparent scarcity around the world, by burgeoning markets in America and Britain, and by a perceived need by Australian governments to prove up and conserve reserves for future domestic use, had long since faded. The price of uranium, at around US \$6 per pound by January 1969, had been depressed since the mid-1950s, and would remain so until the sudden quadrupling of the world crude oil price in 1974. In addition, the United States' 1964 embargo on uranium imports, which quarantined seventy per cent of world demand at that time, had effectively destroyed the world uranium market.⁹¹

Nevertheless, by the late 1960s, many other non-communist nations were beginning to expand their peaceful nuclear energy programmes at increasing rates, which received a further boost from the 1974 "energy crisis". The result was a new exploration boom in Australia, now undertaken by large mining companies rather than individual prospectors, and well under way by mid-1968.⁹²

The potential ability of the reviving uranium mining industry to make a difference at the Cabinet table may have seemed significant to an uninformed observer. In reality, however, the industry's options were limited by the firm grip of the *Atomic Energy Act* (Cth.) 1953. Under Sections 17 and 18, the Australian Atomic Energy Commission enjoyed wide and discretionary powers to control all phases of uranium exploration, mining, milling and export activities. Through the Commission, the Federal government exercised complete legislative control over the industry, reinforced by its external affairs "head of power" under S. 51 (XXIX) of the Australian Constitution.

As a result, the concerns of the uranium mining industry itself (in contrast to those later imputed to it by the "bomb lobby" in regard, for example, to the potential for industrial espionage by International Atomic Energy Agency inspectors) were barely discernible as the Australian government and bureaucracy grappled with the looming NPT during 1967 and 1968. Indeed, no relevant policy development document, whether from the nuclear advocates at the AAEC or the Defence establishment, or from DEA itself, contains any direct reference to uranium industry representations or concerns.

⁹¹ Cawte, A. (1992). *Atomic Australia*. Kensington: University of New South Wales Press. At pp. 137, 138, 146.

⁹² *Ibid.*

Individual influence

Finally, the Australian nuclear policy debate must be understood in terms of the roles played by individuals, both within and outside government, in its development. In analysing Australia's nuclear history, we must take account of the effects of the actions of influential individuals, although not to the exclusion of more institutional or systemically-focused perspectives. In particular, the effect of the nuclear advocacy of Sir Philip Baxter, Chairman of the Australian Atomic Energy Commission from 1965 to 1973, on his Minister, David Fairbairn (Minister for National Development during 1968) and on Cabinet decision-making should not be discounted.

Nor should the individual contributions of M.R. Booker, Paul Hasluck or John Gorton himself. Each brought his own aspirations, convictions and biases to bear on the public or governmental debate over nuclear questions generally, and over the NPT in particular. The fact that none enjoyed a decisive edge in the medium-to-long term does not reduce the importance of their distinctive contributions, although, in Hasluck's case, this was largely negative.

Much has been written about the influence of Sir Philip Baxter on Australia's nuclear policy debate.⁹³ As the head of the Australian Atomic Energy Commission, Baxter was in a position from which he could be expected to provide definitive technical guidance to government on all nuclear matters, through his Minister, David Fairbairn. Baxter was empowered by Sections 17 (3) and (4) (a) (i) of the *Atomic Energy Act 1953 - 1973* (Cth.) to "make recommendations to the Minister in relation to activities of the Commonwealth ... for the purpose of ensuring the provision of ... uranium or atomic energy for the defence of the Commonwealth."

However, Baxter's influence in fact extended well beyond what might reasonably have been expected, given his position and authority. Aided and supported by the forceful style of the Executive Member of the Commission, Maurice Timbs, the Commission's Chairman regarded nuclear affairs almost as his own official fiefdom, to be guarded and defended against all-comers.⁹⁴ Indeed, the strength and durability of

⁹³ See, for example, Cawte, *op. cit.*, at Note 91, Chapter 6: "Baxter, beryl and the bomb"; Martin, B. (1980). *Nuclear knights*. Dickson, ACT: Rupert Public Interest Movement, Inc.; Moyal, A.M. (1975). A study in public decision making. *Search*, 6 (9), 353 - 384.

⁹⁴ *Ibid.* (1975), p. 374.

Baxter's private influence over public policy can be seen in observations made from both sides of the political fence. As Moyal reports, former Liberal Prime Minister William McMahon recalled, in 1975, that it was Baxter who, within both Government and Commission circles, "pressed strenuously for the production of nuclear weapons."⁹⁵

But it was R.F.X. Connor who, from the Labor Opposition benches in the House of Representatives, claimed in 1970 that behind the delay by the Coalition Government in ratifying the NPT lay "the grey eminence, or evil genius ... of this Government and the Prime Minister, namely the Australian Atomic Energy Commission. It has been implacably and consistently opposed to this Treaty."⁹⁶

In support of those views, and from a senior position within the foreign affairs bureaucracy, M.R. Booker (First Assistant Secretary in Division II of the Department of External Affairs) guided and shepherded the evolution of Australian government policy towards the burgeoning NPT during the year leading up to its conclusion. An overview of his efforts, made possible by the release into the public domain of documentary evidence by the Australian Archives, leaves no room for doubt about the strength of his commitment to the cause of nuclear self-denial for Australia and his opposition to the "bomb lobby". It also illustrates the level of influence he was able to bring to bear on various nuclear policy studies within his Department.⁹⁷

One example, from many, is Booker's Minute to Minister Hasluck, following a meeting of the NPT Inter-Departmental Working Group on 23 July 1968. As agreed between Prime Minister Gorton and Hasluck, the Group was to make recommendations to Cabinet, through Hasluck, on whether Australia should immediately sign the Treaty. In his Minute, Booker made plain to his Minister the corporate view of the Department of External Affairs on the question; namely, that Australia's signature on the Treaty would "fortify our own diplomatic efforts [on nuclear non-proliferation]".⁹⁸

Nevertheless, as a cautious and experienced bureaucratic servant of a Minister well known for his suspicion of bureaucratic "capture", Booker was careful to set out the arguments against signing the Treaty. To this end, he offered three points. First,

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ See, for example, Australian Archives Document A 5882/2 CO 32, Pt. 2.

⁹⁸ *Ibid.* At p.3.

signature would generate increasing political pressure to ratify, notwithstanding any reservations the Government may assert. Second, early signature would weaken Australia's ability to carry its own views on the interpretation of the Treaty, especially with the nuclear weapon states, since it would be regarded as already committed to ratification. Finally, Booker pointed out, Australia should wait to see whether "key countries in our own area", as well as "the important near-nuclear countries" were prepared to sign before doing so itself.⁹⁹

On each point, Booker laid out the counter-argument, thereby reinforcing the Department's (and his own) view that Australia should immediately sign the NPT, while he continued to appear faultlessly even-handed. Australia, Booker reminded his Minister, had *already* committed itself to supporting an effective NPT. Again, Australia could make ratification dependent on acceptance of its views on treaty interpretation, while a co-ordinated approach to ratification (with states such as Japan, and Pakistan) may dispel fears about future nuclear security.¹⁰⁰

It is evident that, in Booker, senior diplomats at DEA such as its Secretary, Sir James Plimsoll and his Deputy, Sir Laurence McIntyre - and other advocates of nuclear non-proliferation - had a formidable ally. Well versed in the tactics and strategies of high-level policy development, and furnished with comprehensive and timely intelligence on NPT negotiations in Geneva, Booker was able to guide Australia's NPT policy development towards rejection of the "bomb lobby"'s nuclear advocacy, and towards the eventual total repudiation of all aggressive or deterrent nuclear ambitions.

Beyond the daily ebb and flow of nuclear policy considerations, however, stood the enigmatic figures of Minister for External Affairs Paul Hasluck, and Prime Minister John Gorton. In his own way, each made a lasting contribution to the development of Australian nuclear policy, although sometimes in unexpected ways. Gorton (whose "accidental" elevation to Prime Minister, following the disappearance of Harold Holt in the surf at Cheviot Beach, Victoria, on 17 December 1967, was a *motif* for much of his leadership style) is perhaps Australia's most idiosyncratic, individualistic leader.¹⁰¹ As a

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* At p. 4.

¹⁰¹ See Reid, A. (1971). *The Gorton experiment*. Sydney: Shakespeare Head Press. Especially Chapters 1-3.

politician committed to centralism within the Australian federation, ill-disposed to bend to the wishes of any group beyond Parliamentary Party and electorate, and with a distinctly "presidential" approach to Cabinet government, Gorton could be expected to prevail in important policy areas.¹⁰² Not the least of these was the nuclear arena.

As a nationalist, Gorton had become greatly concerned about Australia's security in the years between 1970 and 1990, and had concluded that long-term reliance on the United States for protection under the ANZUS Treaty was too great a risk to take.¹⁰³ The solution for Australia lay, in Gorton's view, in enhancing its industrial and technological strength, backed up by strenuous efforts to retain American protection guarantees for as long as possible.

In short, Australia should be able, through its own resources, to resist pressure - even nuclear pressure - from any quarter.¹⁰⁴ In view of the nature of the terms of the NPT - renunciation of a nuclear weapons programme for at least twenty-five years, its inherent discriminatory nature (and the fact that near-nuclear states such as India, Israel and Japan initially had no intention of signing it) - it is reasonable to see Gorton's influence in Australia's reluctance to sign. As Trengrove has pointed out, he simply saw no point in closing off, possibly permanently, Australia's nuclear deterrent options.¹⁰⁵ In this, he was successful during the term of his premiership.

Paul Hasluck's influence on nuclear matters is less clear. He had been beaten (on the second ballot of a four-way contest) for the leadership of the Liberal Party - and, thus, the office of Prime Minister - by Gorton on 9 January 1968.¹⁰⁶ As Minister for External Affairs from 24 April 1964 to 11 February 1969, he had directed Australia's foreign policy during a difficult period, marked by the depths of the Cold War and by involvement in the Vietnam War.

¹⁰² *Ibid.* At pp. 14, 29, 30, 42.

¹⁰³ Trengrove, A. (1969). *John Grey Gorton: An informal biography*. North Melbourne: Cassell Australia. At Chapter 20: "Security for the Seventies".

¹⁰⁴ *Ibid.* At p. 204.

¹⁰⁵ *Ibid.*

¹⁰⁶ Reid, A. (1969). *The power struggle*. Sydney: The Shakespeare Head Press. At p. 201.

Despite his belief that the prevention of armed aggression towards Australia was essential to all other objectives,¹⁰⁷ there is no evidence that he regarded an independent Australian nuclear deterrent as indispensable to that goal. Indeed, his deep involvement in securing Australia's military involvement in Vietnam, at the side of the Americans, may well have reinforced his belief in the security guarantees they had extended to Australia under the ANZUS Treaty. In the regional context, his consistent focus was on the consequences for Australia of an expansionist and aggressive Communist China.¹⁰⁸

Nevertheless, as noted earlier, Hasluck made no recorded contribution to the nuclear policy debate emerging from his Department as the NPT grew to maturity. Whatever the reason, Hasluck's demonstrated lack of interest in the question of Australia's nuclear deterrent strategy in fact left the field open for other protagonists, on both sides of the question.

Thus, the nuclear advocates at the Department of Defence and the Australian Atomic Energy Commission, together with Gorton himself, did not have to reckon with a Minister for External Affairs who endorsed and championed, in Cabinet and elsewhere, the views of his senior bureaucrats. By the same token, the nuclear non-proliferation advocates within the academy, as well as in DEA, did not benefit from the overt support of a senior Cabinet Minister with responsibility for foreign affairs.

In these ways, the two most senior figures in Australian public life with ultimate decision-making responsibility in nuclear matters provided a perplexing contrast; one, an idiosyncratic nuclear idealist, the other demonstrably uninterested in nuclear policy development. To this extent, the degree of their influence, as individuals, on the direction of Australian nuclear policy is difficult to judge.

Conclusion

This is the domestic and international context within which Australia developed its response to the text of the draft *Nuclear Non-Proliferation Treaty*. They stand as guide and explanation for the statements and actions of those in the federal bureaucracy, in

¹⁰⁷ Porter, R. (1993). *Paul Hasluck: A political biography*. Nedlands: University of Western Australia Press. At p. 237.

¹⁰⁸ *Ibid.* At p. 231.

political office, in academic life, and involved in the practical application of nuclear technology, who negotiated and arbitrated Australia's nuclear future.

The beginnings of Australia's commitment and engagement in the cause of nuclear disarmament and non-proliferation, a stance which is now understood and acknowledged around the world, can be traced to the dialogue on the draft NPT which developed between officers within Australia's Department of External Affairs and the United States' Arms Control and Disarmament Agency.

Dating from at least the early months of 1967, this relationship established the foundations for the wider scope of non-proliferation co-operation (and recalcitrance) in relations between America and Australia during a period when a significant group within Australia continued to advocate the acquisition of an independent nuclear deterrent.¹⁰⁹ It is to this developing relationship that the study now turns.

¹⁰⁹ In April 1967, a Memorandum from First Assistant Secretary Shann, DEA, to the Acting Secretary, DEA, noted that the Department had received "a good deal of information in confidence from the U.S. and U.K". It added that "... we have not, however, revealed to other countries our possession of the draft texts and the comments we have received". Australian Archives Document A 1838/346. TS 919/10/5, Pt. 1.

CHAPTER THREE

TALKING TO AMERICA: THE DYNAMICS OF NUCLEAR POLICY DEVELOPMENT

Introduction

In 1995 Michael Wilson, an Australian commentator on nuclear affairs, noted that "[s]cepticism and mistrust characterise the attitudes of many Australians towards nuclear energy".¹ Although Wilson was writing in the context of preparations for the 1995 NPT Review and Extension Conference,² his reading of national sentiment rings true in respect of the range of nuclear questions which Australia had confronted almost thirty years earlier.

The ambivalence and ambiguities evident within the Australian nuclear debate in the years leading up to the inception of the NPT in 1968 have been discussed earlier. One element of that debate was certainly a measure of scepticism and mistrust within the broad community, although it was expressed publicly only in muted tones. More directly evident, thirty years later, is the part played by nuclear scepticism *within government* as a more coherent nuclear policy developed.³

They underlie the future nuclear policy directions within government bureaucracies, the Australian nuclear science community and other academic commentators which were manifest in the NPT policy development process.⁴ More specifically, they served as an impetus behind the determination of senior officers

¹ Wilson, M. (1995). *The nuclear future: Asia and Australia and the 1995 Conference on Non-proliferation (Australia - Asia papers No. 74)*. Brisbane: Griffith University Centre for the Study of Australia - Asia Relations, Faculty of Asian and International Studies. At p. 37.

² Millar, C. (1995). Non-Proliferation Treaty extension a major goal. *Insight*, 4 (5), pp. 5, 6, 16. At p. 5. The Conference was held in New York from 17 April to 12 May 1995, in accordance with Article X (2) of the Treaty.

³ The documentary evidence available to the author on this theme was released by the Australian Archives progressively - on 1 January 1997 and 1 January 1998.

⁴ See, for example: Titterton, E.W. (1968). Australia's nuclear power. *Quadrant* 12, pp. 57-63. Others whose views are represented in this paper include Dr. Ian Bellany, Professor Hedley Bull, Dr. J. Richardson and Dr. A. Burns.

within the Department of External Affairs (arguably among the best equipped to do so) to resist the nuclear advocacy of the "bomb lobby".

This chapter begins by examining the struggle for Australian nuclear policy dominance - a struggle in which the interests, agendas, global perspectives and biases of individuals and organisations, on both sides of the question, were evident in their attempts to justify their policy positions through argument and intellectual rigour. In doing so, it will provide a foundation for later analysis of the concerns which Australia expressed to the United States over its difficulties with the terms of the Draft NPT. At the same time, it will help to explain and clarify the form and extent of Australia's influence over early NPT interpretations.

Furthermore, the growing strength of DEA's policy position will be discussed in the context of the Department's close intelligence relationship with the United States Arms Control and Disarmament Agency (ACDA) on treaty negotiations. The significance of that relationship should not be discounted, since it was this Agency of the State Department of the United States Government which was charged with responsibility for negotiating the terms of the NPT with their Soviet counterparts at Geneva.

In Australia, the two agencies of government which are representative of the wider scope of the nuclear policy debate were the Australian Atomic Energy Commission and the Commonwealth Department of External Affairs (DEA). Each was a central participant in the debate, and each generated comprehensive documentary evidence, now released by the Australian Archives, of its attempts to gain nuclear policy ascendancy.

That evidence will be used to analyse the strengths and weaknesses of the positions of each, in order to assess the coherence of their respective policy assumptions and conclusions. The importance of such an analysis can be measured by the enduring effect of the debate on Australia's nuclear policy agenda. As Walsh notes, "In a four-year period from Prime Minister Gorton to Prime Minister Whitlam, Australian nuclear policy had shifted from one of autonomy to one of renunciation."⁵ The legacy of that change remains strong today.

⁵ *Infra.* At Note 7, at p. 18.

DEA and ACDA: A Strengthening Relationship

It is an axiom of international relations that allies talk to each other on matters of mutual interest and concern. As *de jure* equal partners, with New Zealand, in a Pacific Region mutual defence alliance,⁶ the United States and Australia may have been expected to pursue a defence and security relationship marked by free exchange of all information relevant to that alliance. As far as nuclear non-proliferation matters were concerned, such a free exchange was not - at least initially - evident.

Australia had, for many years, played a double hand in its dealings with the US on the question of nuclear diffusion. Thus, while maintaining a modest, safeguarded, peaceful nuclear programme centred on university-based research efforts, and the two Australian Atomic Energy Commission research reactors at Lucas Heights, Sydney,⁷ Australia continued to keep one eye on the independent nuclear weapon prize. Whether through procurement from the United Kingdom (between 1956 and 1963) or through possible indigenous development (1964 to 1972), that option remained as a sub-text in US / Australian non-proliferation discussions until the election of the Whitlam Labor Government on 5 December 1972.⁸

In a domestic sense, Australia's Department of External Affairs was, for a number of reasons, a natural focus of attempts to engage Australia, *unequivocally*, in international efforts to stem the spread of nuclear weapons around the world. First, its diplomatic function gave it an ability to build a dynamic sense of the focus, direction and extent of political, economic and social change on a world scale, through analysis and dissemination of its daily cable traffic with Australia's overseas diplomatic posts.⁹ That proximity to world events, many of which involved war, the threat of war, or civil

⁶ The *ANZUS Treaty* on mutual defence was signed on 1 September 1951 [ATS 1952. No. 2].

⁷ Walsh, J. (1999). Surprise down under: the secret history of Australia's nuclear ambitions. *The Nonproliferation Review*, 5 (1), 14. Available WWW: <http://cns.miis.edu/pubs/npr/walsh51.htm> The two reactors comprised a ten megawatt enriched uranium research reactor (HIFAR) and a smaller graphite/water moderated reactor for physics research (MOATA).

Reynolds, W. (2000). *Australia's bid for the atomic bomb*. Carlton South: Melbourne University Press. At pp. 193, 194.

⁸ *Ibid.* (1999). At pp. 1-14; (2000). At Introduction.

⁹ Diplomatic posts with the most direct relevance to nuclear policy planning in 1967 and 1968 included the Consulate-General at Geneva; Missions to the United Nations at Geneva and New York; High Commissions in London and Ottawa; and Embassies in Washington, Moscow, Vienna, Paris and Bonn.

unrest, gave senior officers at DEA the intellectual authority (and a strong rationale) for counselling caution in response to the nuclear warriors at the Australian Atomic Energy Commission and the Department of Defence. They were, after all, in the business of international diplomacy.

Second, being charged with the practical conduct of Australia's international relations, DEA was well aware of the nature and strength of threats to national security. Through its contacts with the foreign affairs bureaucracies and diplomatic corps of other governments, it maintained a sophisticated corporate understanding of the reciprocal perceptions of Australia's own intentions which were held by other states in the region, and beyond. It was, therefore, well placed to weigh the need to deter possible challenges to Australia's sovereignty and interests against the benefits of diplomatic engagement and renunciation of deterrent arrangements, whether conventional or nuclear.¹⁰

On this count, however, a note of caution is necessary. The depth and accuracy of Australian appreciation of regional threats, such as that perceived as emanating from the People's Republic of China, is ultimately based on assessments of the intentions of a state's political leadership. In a relatively opaque society and polity such as that of mainland China, those assessments are potentially subject to significant inaccuracies.¹¹ Assessment of the response of the leaders of such states which are based on assumptions of rationality or cultural imperatives (such as "saving face") may prove to be wide of the mark, even when full diplomatic dialogue is in place.

A third factor evident in the non-proliferation stance of DEA was a level of disquiet among its senior officers concerning the commitment of the United States to

¹⁰ One example of the degree of sophistication of Australia's strategic nuclear assessments is contained in a Minute written by M.R. Booker as a commentary on a DEA internal assessment of Australian nuclear capability. Prepared on 23 November 1967, it comments on a number of nuclear issues, such as nuclear blackmail threats to Australia, the credibility of any Australian nuclear deterrent, and the effect of withdrawal of US forces from Asia on regional threat scenarios. Document A 1838/346: TS 919/10/5, Pt 1 [16]. Canberra: Australian Archives.

¹¹ An example is an early assessment by DEA of the Australian nuclear policy, prepared in June, 1965. The assessment was provided by K. C. C. Shann, First Assistant Secretary, Division II, DEA, to the Acting Secretary of the Department. It observes, in its introductory summary, that:

Many of Australia's reservations on disarmament schemes stem from concern at the intentions of Communist China and the undesirability of being bound by arrangements which may not bind Communist China.

As subsequent events have shown, this level of concern (a *leitmotif* for much strategic security analysis from 1949 onwards) has proved to be substantially unwarranted. Document A 1838/346: TS 919/10/5 Pt. 1. Dated 18 April 1967. Canberra: Australian Archives.

Australia's security under its ANZUS obligations. As noted earlier, this was frequently expressed within the Department using the rhetorical question "Would the United States ... risk San Francisco for Sydney?"¹² Unlike the independent deterrent proponents of the "bomb lobby", who denied that the United States would do any such thing,¹³ DEA was increasingly answering its own question in terms of the arcane reciprocal psychology which is inherent in mutual deterrence scenarios.

In other words, it is clear from the documentary record that senior DEA policy planners, led by M.R. Booker, were convinced of the necessity and effectiveness of the US Cold War strategy known as "mutually assured destruction". Since this perspective forms the spring from which Australia's eventual nuclear renunciation flowed, the reasoning behind it deserves to be recorded in greater detail:

Major nuclear powers are always going to behave with great caution in situations involving risk of nuclear counter-action. The point is, therefore, not whether the United States can be relied upon to act in a particular way but *that the other side cannot discount the possibility of United States action*. Once nations enter the area of potential nuclear conflict they know they are leaving the world of calculation and controlled action and can lose control of their destinies with great suddenness [sic]. In Australia's case, as a close ally of the United States we can make a reasonable assessment that it is possible the United States would take risk [sic] to protect us. We do not have to be certain of this, all that is necessary is *uncertainty in the mind of our possible nuclear opponent*. (Emphases added)¹⁴

It is not surprising, in view of this strategic premise, that the Department of External Affairs was laying the groundwork for the development of an increasingly important relationship between itself and America's primary agency with responsibility for non-proliferation matters, the United States Arms Control and Disarmament Agency (ACDA).¹⁵ It was imperative that Australia reinforce the probability of US nuclear protection by making plain to Washington its willingness to co-operate on the question

¹² For example, a DEA document headed "Rationale of the NPT", at p. 6. Australian Archives Document A 1838/346: TS 919/10/5, Pt. 4. Possible date: 7 March 1968. Top Secret Austeo ("Australian eyes only").

¹³ *Op. cit.*, *infra*, at Note 21, p. 4, paragraphs 11 and 12.

¹⁴ *Supra*. At Note 12.

¹⁵ The United States Arms Control and Disarmament Agency was created in 1961 by Act of Congress to provide the U.S. President, Secretary of State, Congress and other decision-makers on arms control and disarmament matters with independent advice and recommendations in those areas of United States national and foreign policy. United States Information Service: Briefing Book on International Organizations. *The Arms Control and Disarmament Agency*. [on-line]. Available WWW: <http://www3.itu.ch/MISSIONS/US/bb/acda.html>

of nuclear weapons proliferation. In fact, the relationship had been evolving for some time prior to its most serious test - on the terms of the final Draft of the NPT - in April 1968.¹⁶ It had been given a strong foundation through the willingness of the United States Atomic Energy Commission to share with Australia its understanding of the role and importance of the new NPT.

The USAEC (America's nuclear regulatory body until its replacement in 1974)¹⁷ had, in late 1967, provided Australia with an appreciation of the implications of the developing draft non-proliferation treaty for existing nuclear material diversion safeguards. In a document "passed over [to Australia] during negotiations" the USAEC outlined its views on how the NPT safeguards requirements would complement and extend those already in place under the aegis of the International Atomic Energy Agency in Vienna.¹⁸

The US agency's allusion to the scope of America's previously announced offer to allow IAEA safeguards inspection of all its peaceful-use nuclear facilities was a component of later Australia / United States negotiations. At this earlier stage, however, it comprised just one facet of the body of information on American intentions and interpretations concerning the proposed NPT, to which Australia (in reality, the DEA) was gaining increasing access. Such intelligence would serve DEA well in its successful resistance against the nuclear zeal of its foremost bomb lobby protagonist - the Australian Atomic Energy Commission.

¹⁶ That test occurred at the meeting between Australian Government representatives and the negotiating team from ACDA on the terms of the Draft NPT, held in Canberra on 18 April 1968. Document A 1838/346: TS 919/10/5, Pt. 7.[44]. Canberra: Australian Archives.

¹⁷ The USAEC was superseded by the United States Nuclear Regulatory Commission in 1974 as a response to the so-called "oil crisis" of that year, in an attempt to expedite the licencing of new nuclear generating plants in the United States at an increased rate. United States Nuclear Regulatory Commission (2000). *A short history of nuclear regulation 1946 - 1999* [on-line]. Available WWW: <http://www.nrc/SECY/smj/shorthis.htm#nd>

¹⁸ Document A 1838/346: TS 919/10/5, Pt. 7. [17]. "Safeguards Fact Sheet." Canberra: Australian Archives. The "negotiations" referred to are noted on the document itself, but are not identified further.

Nuclear Warrior: The Australian Atomic Energy Commission

The growing strength of the non-proliferation advocates at DEA during 1967 and early 1968 was matched by the continuing intransigence of the bomb lobby's front line - the Australian Atomic Energy Commission (AAEC).¹⁹ The predominance at the AAEC of Sir Philip Baxter's views on the nuclear weapon option has been discussed in Chapter Two, in relation to the domestic context of Australia's non-proliferation policy development process. The extent of Baxter's influence on the substance of NPT policy discussion papers emanating from the Commission is evident from the private correspondence of one senior officer at DEA.

J. L. Allen, although not directly involved in nuclear matters,²⁰ was sufficiently alarmed by the strength of the Commission's obvious attachment to the nuclear option to make informal approaches to colleagues with direct responsibility for prosecuting DEA's nuclear policy development.²¹ His comments are illuminating.

In a letter to Assistant Secretary (Defence Liaison Branch) Pritchett on 11 March 1968, Allen laid out a summary of the Commission's reaction to the prospect of curtailment of any Australian nuclear weapons acquisition plans. Accusing it of "exaggeration ... distortion ... fabrication ... [and] sticking their nose into other people's business (of foreign and defence policies) ", he made the following observation:

So far Australia has retained its nuclear options. This retention spells Big Business for the AAEC. Relinquishing these options means their losing all this extra business, thereby greatly limiting their scope, importance, etc.²²

¹⁹ The Australian Atomic Energy Commission was constituted under the terms of Division 1, Part II of the *Atomic Energy Act* 1953-1973 (Cth.).

²⁰ Allen was a senior officer in the Economic Relations Branch of DEA during early 1968. Document A 1838/346: 719/10/6. Pt. 3. [168]. Canberra: Australian Archives.

²¹ The Department of External Affairs received the Commission's first version of its objections to the Draft NPT on 22 February 1968. Document A 1838/346: TS 919/10/5, Pt. 3.[133]. Canberra: Australian Archives.

²² *Op. cit.* At Note 20, p. 1.

In a second letter dated 3 April 1968 to R.W. Furlonger, a diplomatic officer at the Australian Embassy in Washington, he reiterated that assessment, adding a rider on the predisposition of the bomb lobby's most senior individual member:

I am [also] afraid Gorton might be our main problem. With something of a "fortress Australia" attitude, I have a hunch he is inclined to be impressed by the warnings from [Minister for National Development] Fairbairn (alias AAEC).²³

Allen's alarm at the Commission's dedicated defence of its interests, apparently at any expense, is confirmed by the many policy documents the AAEC produced in support of its campaign against the NPT. The AAEC undertook a carefully targeted programme of dissemination of its nuclear policy positions, whether or not they lay within its remit. By doing so, it hoped to convince a range of decision-makers within the Gorton Ministry (through relevant Departments) of both the inherent dangers of the NPT, and the wisdom of retaining the nuclear weapon option.²⁴

The Commission's work in developing its policy positions resulted in an analytically complex critique of the international security, international relations, and technical premises underlying the Draft Treaty. Its importance lay in the depth and breadth of its analysis. By examining the new treaty's elements in such a comprehensive way, the Commission helped its opponents at DEA to crystallise their counter-arguments in support of a non-proliferation treaty. For this reason, the policy work of the Australian Atomic Energy Commission will be examined in some detail.

The Commission began its campaign early in February 1968 with a carefully argued paper submitted to M.R. Booker, Deputy Secretary at the Department of External Affairs.²⁵ In it, the Executive Member of the Commission, Maurice Timbs, laid out a series of concerns and objections to the terms of Article III of the Draft NPT, as tabled

²³ Document A 1838/346: 719/10/6, Pt. 5. [141]. At p. 2. Canberra: Australian Archives.

²⁴ Recipients included senior officers in the Departments of External Affairs, Defence, Supply, and Prime Minister and Cabinet.

²⁵ Documents A 1838/346: TS: 919/10/5, Pt. 3. Top Secret/Confidential Austeo. [134]. Canberra: Australian Archives.

simultaneously by the United States and the Soviet Union in the Eighteen Nations Disarmament Committee at Geneva on 18 January 1968.²⁶

The terms of Article III of the Draft NPT (which survived, intact, in the final text of the Treaty) required all non-nuclear weapon States Parties to accept an enhanced safeguards regime, which was to be imposed under the terms of the Statute of the International Atomic Energy Agency. Its purpose would be to oversee and verify adherence by those states to their obligations under the Treaty not to divert "nuclear energy" from peaceful uses to nuclear weapons or other explosive devices. In addition, Article III required *all* States Parties not to provide any "source or special fissionable material", or associated equipment used for its production, processing or use, to any non-nuclear weapon state unless that material was subject to such safeguards.²⁷

The terms of Article III further sought to avoid, through its operation, any denial of the development of nuclear energy technologies for peaceful purposes. Finally, they called for the conclusion of bilateral Safeguard Agreements between the IAEA and individual states (or groups of states) in order to meet those objectives. While the Commission's analysis of the implications of Article III for Australia is wide-ranging, speculative and, to some extent, discursive, its thrust can be summarised as follows:

- Australian accession to the NPT would mean that it would immediately be bound by the terms of the Statute of the IAEA . Specifically, Article III A 5 of the Statute would prevent Australia from "acquiring or manufacturing ... a defensive nuclear weapons system, nuclear submarines (whether nuclear-armed or not), nuclear-powered surface warships [and] ... merchant ships, [and] explosive nuclear devices for peaceful purposes."²⁸
- Any safeguards regime would immediately "affect" the production, use and export of uranium and radioactive beach sand minerals. Inspections would involve

²⁶ See Appendix II. *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC : United States Arms Control and Disarmament Agency. At p. 98.

²⁷ The term "source or special fissionable material" was designed to cover both unprocessed or natural uranium ores and salts, and enriched uranium, plutonium and other processed nuclear materials. Both classes of material are described in the IAEA Statute at Article XX . *Infra*.

²⁸ The Statute of the IAEA is appended at Appendix III. Document A 1838/346: TS 919/10/5, Pt. 3 [134]. Canberra: Australian Archives. At p. 1.

all of Australia's nuclear activities, such as the mining of uranium, the research work of defence laboratories, the enrichment of uranium, and the operation of nuclear reactors.²⁹

- IAEA Safeguards Inspectors, with unfettered access to all nuclear sites, would "present a threat to national and commercial security ... with Australia having [little or no] right under the Statute to reject Inspectors nominated by the Agency".³⁰
- Having signed the NPT, Australia would be bound by the terms of its pre-existing bilateral Safeguards Agreement with the IAEA, which could be amended unilaterally by the Agency's Board of Governors at any time, even against Australia's opposition.³¹ Furthermore, Australia would be powerless to prevent any amendment sought by the United States or the Soviet Union, and equally powerless to secure any amendments which were unacceptable to either superpower.
- The cost of the enhanced safeguards regime would fall relatively more heavily on Australia's shoulders than on most other states, since it would be subject to a greater than average rate of inspection. Australia's nuclear-related activities (such as the mining and milling of uranium ores) would therefore result in it being required to contribute relatively more of the estimated \$US150-200 million annual programme cost than other non-nuclear weapon states which did not undertake peaceful nuclear activities.³²

The AAEC's paper to Deputy Secretary Booker on the implications of Article III of the Draft NPT was revised at least twice as the Commission refined its arguments against the new Draft Treaty, although the general thrust of its arguments remained the same. More significantly, the Commission also took the unusual step of moving beyond the terms of its constituted authority by circulating within government a paper whose stated

²⁹ *Ibid.* At p.2.

³⁰ *Ibid.*

³¹ *Ibid.* At p.3

³² *Ibid.* At p. 12.

purpose was "to examine the implications and consequences to Australia of becoming a party to the NPT."³³

It should be noted that nothing in Division 2, Section 17 of the *Atomic Energy Act* 1953-1973: "Functions and Powers of the Commission" can be interpreted as allowing the Commission licence to offer advice beyond that referred to in Section 17 (4) (a) (i) :

The [various] functions of the Commission specified in sub-section (1) shall be performed only ... for the purpose of ensuring the provision of ... uranium or atomic energy for the defence of the Commonwealth.

In fact, the Commission's paper, dated 22 February 1968, went far beyond those limits in its consideration of the foreign affairs, security and defence implications of Australian signature of the NPT. Whatever the merits of its argument (to be considered below) it must be described as an extraordinary attempt by a subordinate technical agency of a Commonwealth Department to influence Cabinet-level decisions on a matter of fundamental importance to national interests and security.

The second paper (also submitted to M.R. Booker by AAEC Executive Member Timbs) made a forceful and more comprehensive case against the new Draft Treaty. It consisted of a general review, followed by a detailed examination of each Article (again to be considered below). The paper began with rejection of the two desiderata contained in the NPT Preamble - namely the cessation of the nuclear arms race, and a treaty on general and complete disarmament.

Describing the Preamble as "if not cynical, [then] idealistic to the point of unreality",³⁴ the paper maintained that the goal of complete disarmament had disappeared with the advent of nuclear weapons. Armaments, rather than being a symptom of tension between states (as had been the case in the pre-nuclear era), had themselves become a cause of that tension. Furthermore, with the rapid pace of technological innovation (itself a source of political instability) "forces in being" rather than industrial potential were now the primary force to be reckoned with.³⁵

³³ Document A 1838/346: TS 919/10/5, Pt. 3. [133]. Canberra: Australian Archives. At p. 1. There is evidence, however, that the AAEC had been directed to prepare its own "Nuclear Weapons Policy" by its Minister, the Minister for National Development Fairbairn, following a request by the Minister for Defence, Allen Fairhall. Fairbairn was a strong advocate of an independent nuclear deterrent force. Document A 5882/2: CO 32. Pt. 1 [25]. Canberra: Australian Archives.

³⁴ Document A 1838/346: TS 919/10/5, Pt. 3 [133]. At p. 1.

³⁵ *Ibid.* At p.2

All this meant, the Commission argued, that the prime source of international tension would be the nuclear powers, since "there is no problem for a nuclear-armed nation in concealing preparations for nuclear war."³⁶ The catalyst for such a situation would be the development of a credible nuclear weapons capability by Communist China.

The paper completed its geo-political nuclear critique by emphasising that the Soviet Union would continue to exacerbate international tensions, maintain its nuclear forces indefinitely, and reject any efforts aimed at international arms control. Whatever the Soviets' motives for concluding a nuclear non-proliferation pact, they were certainly not to be equated with acceptance of control measures over their own armaments. Furthermore, the paper effectively placed the United States, so far as these issues were concerned, in the same category as the Soviet Union.³⁷ In these circumstances, the implications for Australia, were it to sign the treaty, would involve a "voluntary abnegation of sovereignty in the absence of any agreement for general and complete disarmament ... and in circumstances where controls are to be applied only to the non-nuclear weapons states."³⁸

These two comprehensive policy papers were complemented by a third, prepared by technical officers in the Commission in conjunction with their counterparts at the Departments of Defence and Supply. Given the paper's conclusion, those who contributed to it from within those Departments can be placed securely under the aegis of the "bomb lobby".³⁹ Headed *Technical Implications for Australia of the Draft Treaty on Non-proliferation of Nuclear Weapons*, its primary conclusion was that Australia was being asked to ignore developments in nuclear technology which had brought nuclear weapons production within the economic, industrial and technical capacity of "the smaller advanced countries and some of the more advanced developing countries."⁴⁰ The result for Australia was that, having denied itself a nuclear weapons

³⁶ *Ibid.*

³⁷ *Ibid.* At p. 4

³⁸ *Ibid.* At p. 5.

³⁹ Document A 1838/346: TS 919/10/5, Pt. 3. [132]. Canberra: Australian Archives.

⁴⁰ *Ibid.* At p. 1.

option, it would become even more dependent on its defence alliances for security. The present nuclear powers would simply grow in strength (and particularly so in the case of China), as would new nuclear powers which ignored the treaty. The United States would then become decreasingly likely to use its own nuclear capacity in defence of its allies.

Furthermore, Australia would be subject to "industrial, defence and commercial espionage" by highly-trained international inspectors "from both sides of the Iron Curtain", operating with diplomatic immunity. Neither America nor the Soviet Union would be required to do likewise.⁴¹

Finally, Australia's nuclear weapons technology would be frozen at a relatively primitive stage, relative to other non-nuclear but technologically advanced countries. This would result in a nuclear weapons production lead-time of several years following any withdrawal from the treaty.⁴²

In combination, the three policy position papers established a pattern of vigorous and vehement opposition against the Draft NPT which, as discussed above, played a central role in the consolidation and focus of Australia's nuclear policies *against* the option of acquiring an independent nuclear deterrent force.

The initial reaction of senior officers at DEA to the Commission's onslaught appears to have been one of incredulity - in terms of the ferocity of the attack, the issues it addressed, the arguments it presented and the precepts and assumptions underlying them. As discussed earlier, and elaborated below, DEA (unlike the Australian Atomic Energy Commission) was in possession of a growing body of intelligence from the US Arms Control and Disarmament Agency on the likely direction of the new treaty's interpretation, and not merely on the structure of its text.

DEA's initial - though *ad hoc* - appraisal of the Commission's first paper on the implications of Article III of the Draft Treaty on safeguards arrangements was consistently critical. For example, the Commission had asserted that any Safeguards Agreements to which Australia was a Party would be interpreted by the United States, pursuant to Article III A 5 of the Statute of the IAEA, as excluding Australia from *any* nuclear-related research activities with both weapons and power generation

⁴¹ *Ibid.*

⁴² *Ibid.* At p. 2.

applications.⁴³ As a DEA officer pointed out in marginal annotations, the Draft Treaty did *not* prevent such research: since peaceful use and weapons technology research are ultimately indistinguishable, it simply could not do so.⁴⁴

Furthermore, the Commission argued, existing Safeguards Agreements, including that between Australia and the IAEA, could be amended automatically to take account of the requirements of the Draft Treaty. Non-nuclear weapon states such as Australia would have no option but to accept any new obligations it imposed, however onerous.⁴⁵ DEA's immediate annotated response was that no such arrangement had been announced as a requirement of the Draft Treaty by the U.S. and Soviet negotiators in Geneva.

Again, the Commission argued that Australia's signature on the NPT would adversely affect its bilateral agreement with the United States on civil use nuclear technology co-operation. Its assertion was that, since that agreement was already subject to safeguards arrangements, Australia had *nothing* to gain from signing the NPT.

This was challenged by DEA as spurious. The Commission, it noted, appeared to have taken the bilateral situation in isolation, without acknowledging any wider benefits for Australia's national security of restricting nuclear weapons proliferation.⁴⁶

A fourth fallacious argument concerned the Commission's assertion that exports of nuclear material (in Australia's case uranium) were necessarily restricted by its Safeguards Agreement in place with the IAEA prior to NPT signature, and that their extension under the NPT requirements would further restrict Australia's export potential.⁴⁷ For this to be so, the Commission appeared to be assuming that Australia would be prepared to export its uranium to states *outside* the ambit of the NPT - those which had refused to be committed to renunciation of nuclear weapons. That was an assumption which, in the view of DEA, it was not open for the Commission to make

⁴³ Document A 1838/346: TS 919/10/5, Pt. 3 [134]. Top Secret Austeo. Canberra: Australian Archives. At p.1.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* At p. 3.

⁴⁶ *Ibid.* At p. 5. *Agreement for Cooperation concerning Civil Uses of Atomic Energy*. Signed at Washington 22 June 1956. [ATS 1957 No. 8; 238 UNTS 275; TIAS 3830. Final contemporaneous Amendment 11 April 1967 at Washington. ATS 1967 No. 11; 638 UNTS 268; TIAS 6250].

⁴⁷ *Ibid.* At p. 11.

(notwithstanding the fact that such a decision was outside its sphere of responsibility). Export of uranium for exclusively peaceful use, to a state under the protection of its Safeguard Agreement with the IAEA, would not be restricted as long as that state abided by its promise not to divert nuclear material to weapons manufacture.

Finally, the Commission's estimate of the cost to Australia of enforcing the safeguards provisions of the NPT was based on erroneous assumptions. It reported that the IAEA Inspector-General, A.D. McKnight (an Australian) had forecast an immediate need for 1,600 Inspectors to administer safeguards requirements. The Commission considered this to be a conservative estimate. However, in a recorded conversation with officers at DEA while in Australia, McKnight had stated his present Inspectorate strength at 30 officers. An additional 410 would be needed if all non-nuclear weapon states, together with the US and UK, required safeguards inspections.⁴⁸ A four-fold discrepancy between a cited estimate and direct communication was, DEA noted, difficult to reconcile.

These kinds of insupportable assumptions and arguments (to be further discussed below) were repeated throughout this document and the two complementary papers referred to above. Nevertheless, the deficiencies and inaccuracies they contained were sufficiently serious to signal to the Commission's senior opponents in the Department of External Affairs the importance and urgency of their rebuttal in detail. This was doubly so because the Commission, through Executive Member Timbs, had provided its arguments against signing the NPT, in full, to the Departments of Defence, and Prime Minister and Cabinet, both of which contained significant elements of the "bomb lobby."

In a covering letter to E. White, First Assistant Secretary at the Department of Defence, Timbs had sought White's support for the Commission's arguments, including those contained in its internal *Nuclear Weapons Policy Paper*, prepared at the direction of Minister for National Development Fairbairn.⁴⁹ Timbs was careful, however, to emphasise that the information was for a restricted audience at the Defence Department, limited to White and Permanent Secretary Sir Henry Bland.

⁴⁸ Document A 1838/346: 719/10/6, Pt. 3 [176]. Canberra: Australian Archives.

⁴⁹ Document A 5882/2: CO 32, Pt. 1 [25]. Canberra: National Archives.

DEA as Devil's Advocate: Playing the AAEC Against Itself

For the champions of non-proliferation at DEA, the nuclear activism of the Australian Atomic Energy Commission (driven as it was by Sir Philip Baxter) could be countered in two distinct ways. First, they could point out to decision-makers (especially, in the first instance, Minister for External Affairs Hasluck) the flaws in the Commission's assumptions, arguments and conclusions, in the hope that, by doing so, they would be convinced of the merits of DEA's alternative position.

Second, and more powerfully, DEA could present those flawed components of the Commission's policy positions *in concert* with its own position, thereby allowing their mutual incompatibility to work in favour of the latter. By testing the Commission's hypotheses, DEA could build a synthetic and convincing justification for its anti-nuclear stance. In the event, it attempted both courses of action.

A DEA internal policy development document, prepared in reaction to AAEC's paper objecting to the terms of Article III of the Draft NPT,⁵⁰ demonstrates the first process at work.⁵¹ The paper is an effective demolition of the assumptions underlying the Commission's objections to an enhanced safeguards regime for Australia. Taking those objections in the order addressed above, DEA dealt with the assertion that adherence to the NPT would prohibit the acquisition of nuclear-powered submarines, surface warships and merchant shipping, since they "further[ed] a military purpose" in terms of Article III A 5 of the IAEA Statute.⁵²

DEA pointed out that the United States had *already* acknowledged the fact that Article III of the Statute only precluded the acquisition of nuclear weapons and other explosive devices, as stated in Article II of the Draft Treaty. It would *not*, therefore, preclude the use of nuclear propulsion in any kind of vessel, whether surface warship, submarine or merchant vessel.⁵³

⁵⁰ *Supra*. At Note 25.

⁵¹ Document A 1838/346: 719/10/6, Pt.5. [137]. Canberra: National Archives.

⁵² See Appendix III.

⁵³ Inward Cable No. 964, from the Australian Embassy, Washington, dated 6 March 1968. Document A 1838/346: TS 919/10/5, Pt. 6. [101]. Canberra: Australian Archives.

Second, the "effect" on Australia's production, use and export of uranium, and on its other nuclear activities, of an enhanced safeguards regime requiring on-site inspections of nuclear facilities, was "greatly overstated". The "excessive trouble, expense, industrial espionage, etc." of visits by IAEA Inspectors which the Commission spoke of "were not considered onerous" by nuclear facility operators in the United States.⁵⁴

As the United States had also pointed out, the enhanced safeguards regime would simply augment that already in place. The specific rights and obligations of both parties under a bilateral Safeguards Agreement would be open to some flexibility, provided always that the IAEA could satisfy itself that diversion of materials was not taking place. Furthermore, uranium mining would not be subject to inspection until the ore had been refined to the oxide concentrate stage.⁵⁵

Third, the Commission's prediction that IAEA's inspectors - whom Australia supposedly could not reject - would present a threat to national and commercial security, was dismissed by DEA. There was no reason to expect that one of the basic principles of the current Safeguards System - that unacceptable inspectors *could* (and had been) rejected - would be altered with the advent of the NPT. Such a proposition was "far-fetched".⁵⁶

Fourth, DEA rejected the Commission's assertion of Australia's lack of influence over the terms of a revised "model" Safeguards Agreement, to be developed for all non-nuclear weapons states which signed the NPT. The assumption that any amendment would be to Australia's detriment was "unjustifiable", as was Australia's assumed lack of influence. Australia "ha[d] a voice, as well as friends, on the IAEA Board of Governors, of which Australia [was] virtually a permanent member."⁵⁷ It pointed out, again, that the United States had already indicated that any change to a bilateral agreement of this kind would require the consent of both Parties, and would not be automatic.⁵⁸

⁵⁴ *Ibid.* At pp. 2, 3. *Supra.* At Note 51, p. 1.

⁵⁵ *Ibid.* At p. 3.

⁵⁶ *Supra.* At Note 51, p. 2.

⁵⁷ *Supra.* At Note 51, p. 1.

⁵⁸ *Supra.* At Note 53, p. 1. The US had also reminded Australia of the fact that any changes would require the consent of the IAEA Board of Governors, on which "non-nuclear countries are well represented."

Finally, as to the cost of an enhanced safeguards regime to Australia, DEA held to its initial response. The Commission's long-term estimate of 5,000 inspectors needed to oversee a global Safeguards System compared poorly with IAEA Inspector-General McKnight's estimate of 440, and was "clearly excessive."⁵⁹

The critique which DEA had levelled at the Commission's negative assessment of the implications of the Draft Treaty showed, in its sustained and supported rejection of many of the assumption made, that senior DEA bureaucrats could reasonably expect a fair hearing from decision-makers. It was reasonable to suppose, for example, that Minister Hasluck would be prepared seriously to consider supporting the case for Australia's signature of the NPT within Cabinet. It was also reasonable to assume that support for the principles of the NPT would receive significant opposition from the bomb lobby, both from its bureaucratic elements at the Departments of Prime Minister and Cabinet, Defence, National Development and Supply, *and* from their Ministerial masters.

In the latter circumstances, DEA needed a strategy which was potentially stronger than that provided by the mere demonstration of the flaws in the arguments of the nuclear advocates. It needed a positive exposition of the manner in which acceptance of the NPT and its principles could work for Australia's national interests while, *at the same time*, working to make the world a less dangerous place.

That exposition would have to take account of, and dismiss with authoritative argument and evidence, the alternative view. It would then use the rejected elements of policy as a starting point or foundation for its own policy positions. The strength of the contrast between the two alternative policy vectors would then become a decisive factor determining the shape of DEA Cabinet Submissions on whether or not to reject the "bomb" and its lobbyists.

This second strategy represented, for DEA, the practical application of the maxim that an opponent is more easily defeated by using his own weapons against him. Nevertheless, the task of constructing a compelling case, and one capable of convincing Cabinet to support the NPT, would be far more complex and challenging than the purely negative exercise of criticism. DEA would, ultimately, prove equal to the task.

⁵⁹ *Supra.* At Note 51, p. 4.

Building a Case: DEA as Policy Activist

The senior policy planners at the Department of External Affairs did not, of course, approach the question of accession to a global nuclear non-proliferation treaty from first principles. In June 1966, for example, Cabinet had approved the transfer of safeguards administration in respect of Australia's nuclear facilities and activities from the United States to the International Atomic Energy Agency.⁶⁰ As a result, DEA had already gained some experience in dealing with the activities and inspection requirements of the IAEA Inspectorate. Nevertheless, the anxieties of those harbouring nuclear ambitions were relieved, at that time, by the fact that access to nuclear facilities was only granted, under the terms of Australia's original IAEA Safeguards Agreement, at its own discretion.⁶¹

Moreover, through Australia's permanent presence on the Board of Governors of the IAEA since 1957, the Department had built a comprehensive long-term understanding of the political, legal and technical aspects of the Agency's work, and through them an appreciation of its future role within the terms of the Draft Treaty. Policy planners also had the benefit of a range of contemporaneous material and expertise from within the DEA bureaucracy, and elsewhere, on many of the issues and concerns they would have to address in developing a coherent case for NPT signature.

One important intellectual contribution was a study by Richard Butler, then a diplomat attached to the Australian Embassy in Vienna, to the Australian Ambassador to Austria, A.M. Morris.⁶² In a paper dated December 1967, entitled *Safeguards Under a Non-Proliferation Treaty*,⁶³ Butler sketched the implications for Australia of a comprehensive nuclear diversion safeguards regime. In doing so, he foreshadowed many of the objections of the Australian Atomic Energy Commission on safeguards, while taking a far more optimistic view.

⁶⁰ Cabinet Decision No. 280 of 1 June 1966. Document A 1838/275: 719/10/6, Pt. 2. [18]. Annexe: "Safeguards", (7 December 1966). Economic Relations Branch, Department of External Affairs. Canberra: Australian Archives.

⁶¹ *Ibid.*

⁶² A.M. Morris was Australia's Ambassador to Austria from 1966 to 1970. He also served concurrently as Australia's Resident Representative to the International Atomic Energy Agency at Vienna. Butler was appointed Australia's first Ambassador for Disarmament in 1983.

⁶³ Document A 1838/275: 719/10/6, Pt. 2. [18]. Canberra: Australian Archives.

Butler emphasised at the outset that the general character of the IAEA's inspection, verification and reporting obligations under its Statute (principally expressed in Articles III and XII) meant that the final shape of a bilateral NPT Safeguards Agreement between Australia and the Agency would only emerge in the course of negotiation. It could not, therefore, be anticipated. Noting that the IAEA Safeguards System Document⁶⁴ (defining the scope of its verification activities) was then being extended to encompass the entire nuclear fuel cycle, Butler observed that the efficiency of inspection techniques was increasing, while, simultaneously, the impact of inspections on nuclear sites was shrinking. In fact, research in a number of countries - including the Federal Republic of Germany and the United States - was underway on developing measurement techniques which did not destroy materials, did not interfere with legitimate operations, and respected industrial secrecy.⁶⁵

As to Australia's influence over decisions made by the Board of Governors of the IAEA, Butler noted that "we may take some comfort from the knowledge that the present Inspector-General is an Australian [McKnight]."⁶⁶ More important was his confidence that Australia's continued presence on the Agency's Board of Governors was "ensured" through its technical qualification as the "most advanced" member nation of the Agency in the South East Asia and Pacific Region.⁶⁷ In Butler's view, Australia's influence was enhanced significantly by the terms of Article V (2) of the Draft Treaty on amendments to its terms. This article provided, in part, that:

Any amendment to this treaty must be approved by a majority of the votes of all the parties to the treaty, including the votes of all nuclear-weapon states party to this treaty and all other parties which, on the date the amendment is circulated, are Members of the Board of Governors of the International Atomic Energy Agency.⁶⁸

Although, in reality, this did not mean - as Butler expected - that future NPT negotiations would take place within the forum of the IAEA, he correctly signalled that the "basic authority of action in the working of the Non-Proliferation Treaty" would rest

⁶⁴ IAEA document INFCIRC 66/Rev. 1.

⁶⁵ *Supra*. At Note 63, p. 3.

⁶⁶ *Ibid*. At p. 4.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*. At p.5. The terms of Draft Article V were included, substantially unchanged, in the final text of the NPT as Article VIII (2).

with the Agency. Australia's *de facto* permanent presence on its Board of Governors could therefore be expected to deliver some measure of influence over the ways in which the treaty regime developed.⁶⁹

Finally, Butler briefly addressed the questions of the acceptability of IAEA inspectors to NPT States Parties - based on their nationality - and the cost to states of safeguards implementation. He noted that the acceptability of individual inspectors on the territory of states was a contentious issue which could, and did, have direct effects on the Agency's efforts. Inspectors could be, and had been, rejected.

One element of the notion of state sovereignty (a concept which cannot be precisely defined in international law) is the ability to admit and expel aliens from its territory. The relevance of state sovereignty to the concerns of the Australian Atomic Energy Agency over admission of individual safeguards inspectors will be discussed later, in relation to the direct Australia / US Canberra negotiations of April 1968. In Butler's view, this issue was still far from resolution, while the question of cost allocation remained similarly unresolved. The Soviet preference for individual national responsibility for the costs associated with safeguards was disputed by a "Western position" - not elaborated by Butler - that they should be borne out of the Agency's regular budget.⁷⁰

As an observer of the work of the IAEA at close hand in Vienna, Butler's study paper deserved careful consideration. His appreciation of Australia's influence at the Agency, of the changing technical nature of inspection/verification work, and of related security and cost issues, told a story substantially at odds with that of the Australian Atomic Energy Commission. Its real value lay in its contribution to DEA's resistance against the Commission's arguments on safeguards implementation, an important element of the Department's synthesis of arguments for and against the non-proliferation option.

Of more immediate help to DEA in its formulation of policy on the Draft NPT (especially in its understanding of what Washington may have been prepared to concede on interpretation of its terms) was a United States *Aide-Memoire* of 25 March 1968.⁷¹

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* At p. 6.

⁷¹ Document A 1838/346: TS 919/10/5, Pt.6 [38]. Canberra: Australian Archives.

The *Aide-Memoire* was presented to DEA following the joint tabling, at the Eighteen Nation Disarmament Committee, of the final text of the Draft NPT on 11 March by the United States and the Soviet Union. For the United States, it served a dual purpose. First, it sought to explain to the Australian Government Washington's current views on how the treaty would work to curb nuclear weapons proliferation. Secondly, it made a case for the importance of Australia's immediate support for the treaty through a "public announcement", to be made prior to the resumed session of the 22nd General Assembly of the United Nations, which would debate the terms of the Draft Treaty from 24 April.⁷²

For DEA, the essential elements of the United States' diplomatic communication constituted confirmation of its understanding of the broad thrust of Washington's prospective interpretation of the Draft Treaty. That understanding had been building since at least December 1966, when Australia's diplomatic representatives, principally in Washington, New York and Geneva, began receiving (largely) unattributable progress reports from America's negotiators, diplomats and nuclear administrators on US / Soviet NPT negotiations at Geneva.⁷³

In addition to following the course of the negotiations, a steady stream of diplomatic cable traffic between Canberra and Australian diplomatic posts in Washington, New York, London and Geneva attested to the intense and rigorous attention which DEA was giving to their outcomes.

The US representatives at Geneva, and at the United Nations in New York, as well as senior officers of the US Arms Control and Disarmament Agency in Washington, proved willing to share with Australian diplomats a wealth of detailed intelligence on many aspects of their negotiations with the Soviet Union. That intelligence was immediately transmitted to DEA in Canberra, often in considerable detail, and usually on a "non-attributable" basis to protect its American sources. Thus, Washington's *Aide-Memoire* of 25 March served merely to authenticate and reinforce, on a government-to-government level, DEA's understanding of US / Soviet negotiations

⁷² *Ibid.* See also, *supra*, Note 26, pp. 115 - 126.

⁷³ Document A 1838/275: 719/10/6, Pt. 1. [73] (20 December 1966). Canberra: Australian Archives. Inward Cable from the Australian Embassy, Washington, to DEA, quoting the Head of the Political Affairs Division, United States Arms Control and Disarmament Agency (Kranich) on his summary of informal discussions between the US and the Soviet Union on a Draft Treaty at Geneva and New York. The thrust of his summary was that the "gap" between the U.S. and Soviet positions was closing. At p. 1.

on the terms of the NPT, the substance of which Australia's diplomats had already partially gathered. It formed the framework around which DEA began to construct a nuclear non-proliferation policy for Australia which was capable both of repudiating the AAEC's nuclear weapons option, and sustaining support in Cabinet.

The Australia/US NPT Intelligence Relationship

In late 1967, the development of a coherent Australian nuclear policy which combined an independent nuclear deterrent with rejection of the formative NPT, remained a possibility. One of the most important element of its successful repudiation by DEA was the extraordinary level of intelligence co-operation it enjoyed with the United States. In fact, the depth and comprehensiveness of NPT intelligence links between DEA and US agencies (predominantly the US Arms Control and Disarmament Agency) far exceeded what could reasonably be expected in regard to on-going and finely-poised negotiations on such a weighty and sensitive matter.

Not only was Australia kept informed of their progress on an almost daily basis, but it was also apprised of American perceptions of the positions of its major allies (such as the NATO states) and other important non-aligned states such as India and the United Arab Republic - both present at the Geneva negotiations.

Through this process, senior officers at DEA had an enormous knowledge advantage over its policy rivals on many aspects of the new treaty's mechanisms and operation. By tracing the evolution of this relationship, the study will develop a summary of that intelligence, and its significance for DEA's exposition of an Australian nuclear non-proliferation policy.

Early Relationships.

Representative examples of the extent and depth of early intelligence on the Geneva negotiations are contained in two diplomatic cables to DEA from the Australian Embassy in Washington. The first, dated 3 March 1967 and attributed to a named ACDA officer, contains an updated interim Draft Treaty text, including, for the first time, a Preamble. It also provides the text of a definition of a "nuclear weapon state",

newly inserted in the Draft text in Article V (3).⁷⁴ This definition is of obvious significance for the operation of the Treaty (and Australia's participation in it) in that the designation of "nuclear weapon state" status would bestow on a state privileges denied to non-nuclear weapon states. The most important of these - for Australia - was, arguably, immunity from safeguards verification of peaceful-use nuclear facilities by the International Atomic Energy Agency under the terms of Article 3 (1) of the NPT.

The second diplomatic cable, dated 24 August 1967, contains the text of an "ACDA Background Note" detailing the Draft Treaty text as tabled simultaneously at Geneva by the United States and the Soviet Union on that date.⁷⁵ Its significance lies in the fact that it is a contemporaneous attempt by the United States to explain the current position of negotiations to an ally which it had not, to that point, consulted on its terms.⁷⁶

The most valuable source of early information on the status of the Geneva negotiations was one without attribution, but probably originating from within ACDA.⁷⁷ The document's value lay in its indication of the *strength* of support for the various principles and operational practices outlined in the Draft Treaty from the United States itself, and from its NATO allies during consultations. Such intelligence was welcomed by DEA as an indicator of those non-proliferation principles and practicalities to which, thus far, the US had shown only equivocal attachment. To senior officers at DEA, they

⁷⁴ Document A 1838/275: 719/10/6, Pt. 1. [76]. Canberra: Australian Archives. Classified "Secret". "Nuclear weapon state" was defined as "... one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967". This definition was incorporated, unchanged, into Article IX (3) of the Final Text.

⁷⁵ Document A 1838/275: 719/10/6, Pt. 1 [91]. Canberra: Australian Archives.

⁷⁶ A US Arms Control and Disarmament Agency account of the history of the evolution of the NPT states that:

In August, the United States and the Soviet Union agreed on a draft treaty, except for the safeguard Article, and completed their consultations with their allies. On August 24 the two countries tabled identical texts of a draft treaty at Geneva.

International negotiations on the Treaty on the Nonproliferation of Nuclear Weapon. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At p. 78.

⁷⁷ Document A 1838/346: TS 919/10/5. Pt. 1. [12]: 18 April 1967. Canberra: Australian Archives. Classified "Secret and Guard". The means by which this document came into the hands of DEA is not known. It detailed changes to the Draft NPT which had been suggested by NATO allies (whether or not the US accepted them), those "proposed and recommended" by the US, and changes suggested by the US, though "not particularly favoured by it".

represented points of possible future influence over interpretation, if not necessarily over substance.

In this context, the document's most significant contribution was to indicate those parts of the negotiating text which had been incorporated (with or without endorsement and support) by the United States from suggestions made by its NATO allies. Among them was a proposal for five-yearly Review Conferences of States Parties, in order to review the operation of the treaty and its purposes, as laid out in the Preamble. This proposal was accepted by the United States, and later became Article VIII (3) in the Final Text.⁷⁸

One of those preambular purposes had also been instigated by NATO states: that one of the treaty's intentions was to achieve the cessation "at the earliest possible date" of "the nuclear arms race". At the time of its inclusion in the Geneva negotiating process, that proposal had *not* been accepted by the United States, although it was later included as part of Article VI, using the term "at an early date".⁷⁹

As far as DEA was concerned, these developments indicated that the United States appeared willing to take the views of its major allies seriously into account on issues they regarded as being of fundamental importance. The US had shown itself ready to place those views before those of its Russian rival, even though it remain unconvinced of their value. The lesson drawn by DEA was that, within the entire nuclear non-proliferation arena, the US was, apparently, willing to compromise on detail in order to secure the main goal of a workable, and generally acceptable, multilateral non-proliferation treaty.

As shown by its reaction to proposals from its allies, the US had followed a flexible approach to negotiating its position. For example, it proposed to include in the text of the Preamble the statement that:

.... all parties are entitled to participate in the fullest possible exchange of scientific information for, and to contribute alone or in co-operation with other States to, the further development of the application of atomic energy for peaceful purposes.⁸⁰

⁷⁸ *Ibid.* At p. 6.

⁷⁹ *Ibid.* At p. 1.

⁸⁰ *Ibid.*

As a *quid pro quo* offered to the non-nuclear weapon states in exchange for their promise not to engage in weapons manufacture, such a concession was clear evidence of America's pragmatism on this score. It was a price the United States was willing to pay in the face of an urgent need to curb the diffusion of nuclear weapons.

Furthermore, the depth and consistency with which the United States consulted Australia's diplomatic representatives on NPT negotiations (addressed below) suggests that the US saw particular advantage in ensuring that Australia was aware, as soon as possible, of its negotiated position with the Soviet Union. The US appeared to take the view that such a policy was likely to increase the certainty of Australia's immediate accession to the new treaty. An ally which was *treated* as an ally could reasonably be expected to *behave* like one.

From early to mid-1967, until the conclusion of the final text of the treaty in negotiations between the United States and the Soviet Union,⁸¹ the breadth, depth and frequency of intelligence communication between DEA and the U.S. Arms Control and Disarmament Agency was sustained. In fact, it appears that the willingness of Australia's diplomats in Washington and Canberra to protect their intelligence sources (normally middle-ranking officers representing ACDA at the Eighteen Nation Disarmament Committee negotiations at Geneva, or in Washington) was instrumental in the trust which those officers showed in the security of their briefings.⁸² This was reinforced by the fact that no "inside" briefings were then being given to the US press on the progress of the draft NPT text.⁸³

The documentary record of the early development of the NPT intelligence relationship reveals a series of milestones marking the evolution of DEA's growing understanding of the United States' negotiating position. First, it had become clear to DEA, as early as mid-April 1967, that US President Johnson was taking a personal

⁸¹ *Supra*. At Note 76.

⁸² In a cable marked "Secret and Guard" of 14 April 1967, the Australian Embassy in Washington noted:

We ... underline the desirability of continuing to safeguard carefully the material given to us by [US officials, one of which] has on occasion made some not so droll remarks to us about the practice of some European countries of leaking US views and/or information to other countries.

Document A 1838/275: 719/10/6, Pt. 1. [83]. 14 April 1967. Canberra: Australian Archives.

⁸³ *Ibid*.

interest in the progress of the Geneva negotiations, and that the White House had been exerting considerable pressure on the US negotiators to make meaningful progress.⁸⁴ It appeared that Johnson, facing an election in November 1968, was searching for the kind of political kudos which had accrued to President Kennedy following the conclusion of the 1963 *Limited Test Ban Treaty*.⁸⁵

Furthermore, to Australia's Washington observers, it seemed likely that fresh and substantial progress towards arms control was now a central plank of Johnson's re-election strategy.⁸⁶ This level of focus on a positive outcome in the Geneva negotiations, from the highest political level in Washington, could only benefit DEA's own anti-nuclear, anti-independent deterrent strategy for Australia.

A second revelation concerning Washington's negotiating strategy appeared from the US Arms Control and Disarmament Agency at the same time (although from a different internal source). This consisted of a broad overview of the status of America's negotiations with its European and other allies, as well as with important non-aligned nations, on the projected form and operation of the NPT.⁸⁷ Its main effect was to indicate to DEA the level of support for the NPT around the world, both in terms of the non-proliferation principles it embodied, and the conditions under which such a treaty was likely to find substantial support (such as the promise of joint security assurances to non-nuclear countries from the nuclear weapon states).

As DEA knew, general support for the treaty from major Western allies, nuclear threshold states such as Japan and India, and a substantial number of non-nuclear states would be a prerequisite for its final support by the Australian government. ACDA's survey of world support in April 1967 indicated that the NPT was indeed likely to find widespread backing. In Europe, Soviet suspicions concerning West Germany's nuclear ambitions outside a pan-European non-proliferation regime (under the auspices of the European Atomic Community - "Euratom") appeared to be the most significant

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* 480 *U.N.T.S.* 43. Australia's Washington Embassy referred to the "substantial popularity President Kennedy had regained in this way, following the 'Bay of Pigs fiasco' [in Cuba]".

⁸⁶ *Op. cit.*, at Note 82.

⁸⁷ Document A 1838/275: 719/10/6, Pt. 1. [84]. 14 April 1967. Canberra: Australian Archives. The source was a discussion between the Head of the Political Affairs Division of ACDA, Kranich, and M.R. Booker at the Australian Embassy, Washington.

stumbling block to wide future NPT accession. France, however, was unlikely to sign, although it was possible that it would undertake to act in conformity with its terms.⁸⁸

In Asia, the primary concern of the crucial nuclear threshold states, India and Japan, was with Communist China. The US approach had been to offer its own security guarantee to both countries. While India was holding out for a joint US-Soviet security guarantee, Japan's close security links with America meant that it would probably accept an enhanced version of its existing nuclear guarantees from the United States.⁸⁹

In summary, it appeared that the NPT would find favour with a number of important non-nuclear, non-aligned and nuclear threshold states. At that stage, however, it remained to be seen whether the actual level of global support would be sufficient to develop the momentum which a multilateral treaty needed in order to become universal.

Later Relationships

Towards the end of 1967, the nature of US intelligence briefings began to change as the final form of the treaty text became clearer. NPT intelligence briefings to Australian diplomats in Geneva and Washington became increasingly frequent and more detailed. As a result, the text of the developing treaty, together with initial American interpretations of the meaning and operation of specific Articles, was now becoming evident to senior officers within DEA.

The ACDA "Background Note" referred to above⁹⁰ had declared the US position at 24 August 1967 on the content and interpretation of the Draft NPT tabled at Geneva on that date. Its main points can be summarised as follows:

- The central core of the Draft Text lay in Articles I and II, which would bind nuclear weapon powers not to transfer nuclear weapons to non-nuclear weapon states, and the latter not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices. The term "other nuclear explosive devices" referred to any nuclear device which was not intended for use as a weapon, but whose character and technology was indistinguishable from a nuclear weapon.

⁸⁸ *Ibid.* At p.1.

⁸⁹ *Ibid.* At pp. 2, 3.

⁹⁰ *Supra.* At Note 75.

- The treaty dealt with what was *prohibited*, not what was *permitted* (such as nuclear planning which does not involve the transfer of nuclear weapons or devices). This was an early indicator of a fundamental point of interpretation on which the United States would later insist, not least in its bilateral negotiations with Australia in Canberra, in April of the following year.
- All signatory states would work for other measures to halt the nuclear arms race.
- The questions of verification of compliance with the terms of the treaty, and of safeguards against illicit transfer of weapons were not yet resolved. At this stage, therefore, Article III was left blank. However, the goal of the US was a system of effective, mandatory safeguards administered on a world-wide basis.
- Article IV provided that the treaty should not impede the development of nuclear energy for peaceful purposes. All parties would undertake to facilitate, and have the right to participate in, the fullest possible co-operation in regard to the development of such activity. A state's nuclear activities for peaceful purposes included research, production and use, as well as information, equipment and materials.
- Any amendments to the treaty would require a majority vote of all nuclear weapon States Parties, and of those parties which were contemporaneous members of the Board of Governors of the International Atomic Energy Agency. This would allow a reasonable chance for the adoption of majority amendments, while preventing the adoption of amendments lacking wide support among states with advanced peaceful nuclear programmes.
- The operation of the treaty would be reviewed by States Parties after five years, but it would have an unlimited duration, in order to avoid a "countdown" atmosphere leading to clandestine preparations for weapons acquisition as the treaty expired.

- "Nuclear weapon states" were to be defined as those which possessed such devices on 1 January 1967, in order to freeze the number at five by preventing other states from achieving that status before signature.
- The question of additional security assurances for some (unspecified) non-nuclear states remained unresolved. They would not, however, be resolved within the terms of the treaty itself, but as separate considerations.

In addition, several more general DEA concerns on the status of the Draft Text (and its US interpretations) could now be answered, following informal discussions in Washington between ACDA officers and Australian diplomats. First, the Soviet negotiators had agreed to remain at Geneva for as long as possible, in order to conclude negotiations there, rather than in the less practical forum of the United Nations General Assembly. Soviet commitment to a nuclear non-proliferation treaty could not, therefore, be seriously doubted.⁹¹

Second, and contrary to its recently tabled position, the United States was *not* now opposed to a treaty of limited duration, although "anything less than 20 or 25 years was out of the question" as potentially ineffective.⁹² As far as DEA was concerned, a temporally limited treaty would, *ceteris paribus*, be more acceptable to the Gorton Cabinet than one which was open-ended.

On the question of amendments, ACDA assured Australian diplomats in Washington that the amendment provisions made major changes virtually impossible. A state which was not on the Board of Governors of the IAEA, not in agreement with a majority of parties, and not itself a nuclear weapon power, was very unlikely to have unwanted amendments forced upon it.⁹³ Again, ACDA asserted that the requirement for the US, along with all other States Parties, to pursue an end to the vertical proliferation of nuclear weapons "involved the most complex problems, and ... progress would take a very long time". Given the current state of the world (in which a nuclear Communist China was a new and credible threat) no American ally would seriously expect the US

⁹¹ Document A 1838/275: 719/10/6, Pt. 1.[78]. 12 September 1967. Canberra: Australian Archives. At p.1.

⁹² *Ibid.*

⁹³ *Ibid.* At pp. 1, 2.

to start doing away with its nuclear weapons.⁹⁴ Such an assurance, although it stood in direct contravention of Article VI of the new treaty, would be vital in DEA's case for renunciation of an independent Australian nuclear arsenal. It was also intelligence of the highest sensitivity, and another potential point of leverage for DEA in discussions with the United States over NPT interpretation.

Finally, the Soviet Union was now clearly committed to a workable treaty, having retreated from its previous suspicion over the independent nuclear ambitions of the Federal Republic of Germany.⁹⁵

For DEA, the missing component of the NPT Draft Text - the Article III provisions on nuclear diversion safeguards - became clear through a United States *Aide Memoire* of 13 November 1967.⁹⁶ The proposed safeguards provisions would be of vital importance in DEA's case for accession to the treaty, and later proved to be another major point of leverage in DEA's discussions with ACDA over the treaty's interpretation.

The *Aide Memoire* set out the status of negotiations on Article III with the Soviet Union, together with changes to its text which were the result of discussions with the Euratom states.⁹⁷ While the views of those states were not directly relevant to US interpretations of NPT safeguards provisions,⁹⁸ the ways in which the US sought to accommodate their concerns on this score provided DEA with a clear indicator of American understanding of this crucial issue.

Since the text of Article III survived intact in the final treaty text, early US interpretations of their meaning and operation would be an invaluable tool in DEA's rebuttal of the Australian Atomic Energy Commission's rejection of proposed NPT safeguards procedures. Specifically, US reaction to the thrust of Euratom's "Five

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* At p. 2.

⁹⁶ Document A 1838/346: 719/10/6 Pt. 6. [175]. Canberra: Australian Archives. The draft text of Article III, as it appeared on 13 November 1967, survived intact in the Final Draft, and in the treaty now in force (see Appendix II).

⁹⁷ Those states were Belgium, West Germany, Italy, Luxembourg and the Netherlands, each of which was also an ally of the United States within NATO.

⁹⁸ This was so except to the extent that, should the Euratom states agree to negotiate a joint Safeguards Agreement with International Atomic Energy Agency (under the terms of Article III (4) of the Draft Text and Article III (A) (5) of the *Statute of the International Atomic Energy Agency*), the verification procedures they would undertake would have to be consistent with those of the IAEA itself. *A.T.S.* 1957, No. 11.

Principles" (on safeguards and verification) were illuminating. First, the US agreed that the provision in an earlier draft which extended safeguards procedures to nuclear facilities, as well as to nuclear materials, should be deleted.⁹⁹ In practice, however, such a compromise was redundant, since nuclear materials would normally be found only within a designated nuclear facility.

Second, Euratom's insistence that it be permitted to apply internal safeguards procedures on the basis of an agreement with the International Atomic Energy Agency was strongly endorsed by the US as fully mandated by the IAEA Statute.¹⁰⁰ The significance of the American position on this point was that individual agreements between states and the IAEA on safeguards procedures (such as the revised Safeguards Agreement which Australia would have to negotiate, should it sign the NPT) were also to be clearly tied to the Statute. This should give individual states - including Australia - confidence that Safeguards Agreements would have the legal and institutional strength needed for the duration of the treaty.

Third, Euratom asserted that procedures for implementation of safeguards verification (for example, how, and by whom, inspection of nuclear facilities would be carried out) should be contained within any Agreement with the IAEA.¹⁰¹ The United States commented in its *Aide Memoire* that Safeguards Agreements were for the exclusive purpose of verifying the fulfilment of obligations undertaken through the treaty. By implication, therefore, the methods of fulfilment must be contained within any Safeguards Agreement.¹⁰² Here, then, was a strong legal foundation for DEA's assertion of the benign nature of nuclear safeguards inspections, based on the regulation of inspection activities under agreed conditions.

In dealing with the concerns of the Euratom states on this point, the United States also set out a series of principles on the operation of safeguards which formed a second basis for DEA's arguments in support of their strength. They can be summarised as a requirement for effectiveness, combined with gains in efficiency from the

⁹⁹ *Supra*. At Note 95, p. 2.

¹⁰⁰ *Ibid. Supra*. At Note 97.

¹⁰¹ *Ibid*. At p. 3.

¹⁰² *Ibid*.

appropriate use by the IAEA of existing records and safeguards procedures, to be incorporated into the new NPT Safeguards Agreements.

The fourth principle concerned the ability of non-nuclear weapon states to supply unsafeguarded nuclear materials or equipment to other non-nuclear weapon states during the period from the treaty's opening for signature, up to its entry into force.¹⁰³ Here, the US expressed no concern about the ability of the Euratom states to take advantage of the inevitable delay in the NPT's entry into force. By implication, it would not do so in Australia's case. In the event, Australia did not sign the treaty until the last possible moment before its entry into force on 5 March 1970).

Finally, the fifth Euratom principle concerned the imposition of a limited time period for signatory states, or groups of states, to conclude Safeguards Agreements with the IAEA. The US position was that a time constraint was essential if global implementation of safeguards was to be secured.¹⁰⁴

The final point of significance to DEA in the United States *Aide Memoire* was its observation that the Article III text had been amended to add the word "control" in paragraph 1. This meant that safeguards would be applicable to the peaceful nuclear activities of a non-nuclear weapon state party regardless of whether it took place on its own territory. As long as such a state exercised control over the processes involved, its safeguards obligations must be observed. The effect was to widen still further the reach of the IAEA safeguards regime, and thus the confidence of non-nuclear weapons states, such as Australia, in its efficacy.

Conclusion

This chapter has traced the early course of the struggle for nuclear non-proliferation policy dominance between the advocates of an independent nuclear-armed Australia and the champions of the new NPT. Battle was joined, at this stage, largely through competing policy development papers, the influence of scientific, bureaucratic and

¹⁰³ *Ibid.* At pp. 4, 5. The NPT was opened for signature on 1 July 1968. It came into force on 5 March 1970 following ratification by the three Depository states, the United States, the United Kingdom and the Soviet Union, and forty other states. Fischer, G. (1971). *The non-proliferation of nuclear weapons*. London: Europa. At p. 1.

¹⁰⁴ *Ibid.* At p.5. The time period laid down in Article III (4) of the NPT allows 180 days from the date of deposit of instruments of ratification with the Depository States, until negotiations on a Safeguards Agreement must be initiated with the IAEA.

political individuals (for example, Baxter, Booker and Gorton) and the growing wealth of relevant intelligence in the hands of the diplomats of the Department of External Affairs. The Department's skill in rebutting the strident arguments of the Australian Atomic Energy Commission (and its Chairman, Sir Philip Baxter) was clearly evident. DEA succeeded in exposing the flaws in the Commission's premises and analysis of the issues involved, and would ultimately prove equal to the task of steering Australia towards renunciation of its nuclear ambitions.

Nevertheless, DEA still faced serious obstacles in its quest to develop a policy position which was capable of sustaining support within the Gorton Cabinet. The strategy it employed in reaching that goal would result, almost incidentally, in Australia exerting a significant level of influence over the early interpretation of the terms of the NPT.

In surprising the United States with its recalcitrance, Australia leveraged a position of influence well in excess of what could reasonably be expected from an ally of its relatively moderate means and significance. The scene of Australia's resistance, which marked a milestone on its journey from secret nuclear warrior to disarmament crusader, would be the April 1968 meeting between Australian government representatives and their United States counterparts in Canberra. It is to the preparations for this important event, and its international legal implications, that the study is now directed.

CHAPTER FOUR

TURNING THE SCREW: THE PARADOX OF INFLUENCE THROUGH RESISTANCE

Introduction

In an internal paper prepared during early 1968 for Australian Government Ministers, nuclear policy planners at the Department of External Affairs made the following observation:

Not to sign [the NPT] would be no doubt regarded seriously by the United States and by our Asian neighbours One of the general questions for decision would be whether Australian relations with the United States would be served by opposition to the United States (particularly in public) on a firm aspect of U.S. policy, particularly having in mind that Australian security rests heavily on our alliances with the United States. *It may also call into question (without foundation) our exact intentions in the nuclear weapons field.* (emphasis added)¹

As 1968 began, it was becoming clear to all parties with an interest in Australian nuclear affairs that a completed United Nations multilateral non-proliferation treaty was likely to be opened for signature by states within months. Australia's diplomatic observers at the Eighteen Nation Disarmament Committee negotiations in Geneva had reported to Canberra, on 18 January 1968, that significant progress on the final Draft Text of the NPT was now being made.²

Furthermore, the member states of the ENDC expected, by 15 March, to approve a report and draft treaty text for immediate submission to the UN at New York. The resumed session of the First Committee of the United Nations General Assembly was then expected to debate the terms of the NPT during late April.³ Such rapid progress served to focus the minds of all interested parties on the questions which Australia must confront in order to present a clear, defensible and sustainable *public* national position on the NPT to the United States, the Western Alliance, and the United Nations. Should

¹ Document A 1838/346: TS 919/10/5, Pt. 1 [2]. (no date). *Draft treaty on the non-proliferation of nuclear weapons: Comments by the Department of External Affairs on possible contents of a paper for Ministers*. Canberra: Australian Archives. At pp. 8, 9.

² Document A 1838/346: TS 919/10/5, Pt. 4 [21]. (18 January 1968). *ENDC discussions and national attitudes towards treaty*. Canberra: Australian Archives. At p. 10.

³ *Ibid.*

Australia seek to lay out its policy on the NPT in the context of the UN debate, little time remained in which that position could be finalised. The primary question to be resolved by the Australian Government, without delay, was whether Australia should immediately sign (and subsequently ratify) the new treaty upon its opening for signature. The urgency of that requirement is underscored by the fact that Australia was the only English-speaking member state of the Western Alliance that, by early in 1968, continued to resist it.

This chapter will examine the process by which the internecine struggle for policy supremacy between the diplomats at the Department of External Affairs and the "bomb lobby" protagonists was resolved in light of the urgent necessity for an *Australian* policy on nuclear proliferation. Australia would soon be called upon, in the UN General Assembly, to support or reject the simple proposition that all nation-states not already in possession of nuclear weapons should renounce, in international law, their sovereign right to acquire them. The debate between the nuclear nationalists and those who placed Australia's interests firmly in line with the objectives of the NPT, would therefore be concluded in the context of Australia's alliance relationship with the United States, and determinations about Australia's national interests. Put simply, internal policy conflict had now to be replaced by external policy consensus.

Awareness and concern within the Prime Minister's Department - and in Cabinet itself - on the need to confront the NPT was evident in the views of the newly appointed Secretary of the Department of Prime Minister and Cabinet, Lennox Hewitt. In forceful terms, Hewitt drew Prime Minister Gorton's attention to the need to confront Washington over the value to Australia of the mutual defence terms of the ANZUS Treaty, perhaps as a *quid pro quo* for Australia's participation in the prospective NPT.⁴ This was especially important, in Hewitt's view, in light of Gorton's approaching visit to

⁴ The Permanent Head of the Prime Minister's Department, C.L. (Lennox) Hewitt, expressed his reservations on the terms of the NPT, and its effects on Australia's alliance relationship with the United States, in a Memorandum to Prime Minister Gorton on 28 April 1968, in preparation for Gorton's forthcoming discussions in Washington with the U.S. Government. *1968 Cabinet documents - selected imaged documents*. Canberra: Australian Archives. [51]. Available[Online]: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/A5619C48_1.htm. In addition, Gorton himself, in reply to Minister for National Development Fairbairn, suggested in mid February 1968 that, to assist the decision-making process, each interested Department should present its own objective submission to Cabinet on the accession to the forthcoming NPT. Document A 1838/346: TS 919/10/5, Pt. 6 [27]. Canberra: Australian Archives.

Washington.⁵ Faced with these imperatives, the competing interests of the nuclear factions steadily coalesced into an "Australian position". It was this - apparently united - position which confronted the team of United States negotiators when they met Australian Government representatives in Canberra on 18 and 19 April 1968.

By the time the US Mission began discussions in Canberra with its Australian counterparts (from all interested government departments and agencies) the process of nuclear policy consolidation had, through necessity, reached a point from which the Australian state could present its allies with a coherent set of national concerns over the terms of the new treaty. Those concerns, however, were still largely a reflection of the factional battle between the bomb lobbyists and their opponents at DEA, whose tactical "devil's advocacy" appeared, in view of the outcome of the talks, to be bearing fruit.

As the record of the negotiations reveals, many of the lines of enquiry and negotiation between the Australian and American sides - such as the exact meaning of the requirements of Article III of the NPT on diversion safeguards and the meaning of the phrase "manufacture ... of nuclear weapons" in Article II - were generated by the unresolved antipathy between those on either side of the Australian nuclear policy divide.⁶ Nevertheless, as discussed below, the US positions on interpretations of the terms of the NPT and related security matters, disclosed during the negotiations in Canberra, militated strongly *against* any need for an independent Australian nuclear deterrent.

Policy Planning by Committee: Advising the Advisers

In order to bring together the positions of all interested government departments on questions raised by Australia's signature of the NPT, a policy consolidation structure was established which was designed to ensure that Cabinet was provided with sufficient, and timely, information on which to make decisions concerning the new

⁵ Gorton visited Washington (for the first time since his elevation to the Prime Ministership in January 1968) from 25 May to 1 June 1968. He held talks with US President Johnson, and with senior members of his Cabinet, including the Secretary of State, Dean Rusk and the Secretary of Defense, Clark Clifford. Gorton to get LBJ's jet for U.S. visit. (1968, May 7). *The Australian*, p.2. Gorton will meet all the top men on U.S. visit. (1968, May 23). *The Australian*, p.1.

⁶ Summary Record: Meeting of officials of the United States and Australian Governments, Department of External Affairs, Canberra, 18th - 19th April 1968. Document A 1838/346: 719/10/6, Pt. 5 [158]. Canberra: Australian Archives. At p. 21 *et seq.*

treaty. Initiated by DEA and ratified by the inter-departmental Defence Committee, the organisational structure consisted of a "high level Working Group" of representatives from interested departments, reporting to the Defence Committee. The Working Group's Report would eventually form the basis of a joint Cabinet Submission by the Ministers for External Affairs (Hasluck) and Defence (Fairhall).⁷

The Working Group comprised senior representatives of those departments most directly concerned with the implications of signing the NPT, namely the Departments of the Prime Minister, External Affairs, National Development and Defence, together with the Australian Atomic Energy Commission (an agency of the Department of National Development).⁸

The Defence Committee itself was chaired by the Permanent Secretary of the Department of Defence, Sir Henry Bland, who proved to be both an opponent of the NPT and an advocate of a more strongly independent line with the United States.⁹ In view of AAEC Chairman Sir Philip Baxter's presence on the Committee, their alliance against the treaty, at this stage of its progress through the bureaucracy, was probably the final and most decisive chance for the bomb lobby to prevail.

Also present on the Defence Committee were General Officers from each of the three Armed Service, and the Permanent Secretaries of the Departments of External Affairs (Sir James Plimsoll), National Development (Boswell), Supply (A.S. Cooley) and Treasury (Randall), together with Cabinet Secretary Sir John Bunting (later replaced by Lennox Hewitt).

The nuclear nationalist alliance of Baxter and Bland ultimately failed to carry its views in these fora. That failure also signalled the advent of the paradox of Australian influence over the United States. Australia was to prove itself willing to deny America the support of all its allies on the NPT (a consensus it keenly sought) through the fulcrum of resistance; not the resistance of outright rejection, but of insistence on interpretative clarity.

⁷ Document A 1838/346: TS919/10/5, Pt.6 [27]. (6 March 1968). Canberra: Australian Archives. At pp. 1, 2; *Infra*. At Note 9.

⁸ Document A 1838/346: TS919/10/5, Pt. 5. [34]. *Defence Committee Agendum No. 9/1968*. (18 March 1968). Canberra: Australian Archives. At p. 38.

⁹ Walsh, W. (1997). Surprise down under: The secret history of Australia's nuclear ambitions. *The Nonproliferation Review*, 5 (1) At 15, 16. Available WWW: <http://cns.miis.edu/pubs/npr/walsh51.htm>.

In reviewing the deliberations of the Working Group, and the Defence Committee to which it reported, several documents stand out as representing the central process of nuclear policy consolidation. Each helps to clarify the interests, assumptions and biases of the various participants in meetings whose outcomes were likely to have a profound effect on Australia's future. As those taking part were well aware, the foundations of Australia's strategic security were in the balance. It is important, however, to note that behind the contributions made within the meetings of these groups lay (especially in DEA's case) an intensive effort to understand the implications of the NPT through diplomatic links with Washington, and internal departmental analyses of its emerging text.

The first meeting, called by DEA on 9 February 1968 between itself and representatives of the Departments of Prime Minister, Defence and National Development (together with the AAEC) produced only a request for DEA to circulate to its participants a commentary on the operative articles of the Draft Treaty text. As a technical agency, the Australian Atomic Energy Commission was to provide a complementary analysis of the implications of the terms of Article III on nuclear material diversion safeguards.¹⁰ This arrangement was a two-edged sword for AAEC. While it left the Commission free to demonstrate the cogency of its own arguments on the technical aspects of the safeguards implications for Australia, it allowed it no opportunity - at this stage - to attack DEA's views on the wider significance of the treaty and its interpretation.

The Commission was, to this extent, placed at a distinct disadvantage, especially as the Defence Committee was to meet on 7 March to consider the entire question of a nuclear non-proliferation treaty in light of the circulated views of interested parties. It was further disadvantaged by the Defence Committee's decision, at that meeting, to exclude representatives from the Departments of Prime Minister and National Development from the composition of the Working Group. Their absence would be acutely felt by the Commission, since both enjoyed (in Gorton and Fairbairn, respectively) the political guidance of strong exponents of an independent Australian nuclear capability.

¹⁰ Document A 1838/346: TS 919/10/5, Pt. 2 [24]. (9, 16 February 1968). Canberra: Australian Archives. See also Note 25, Chapter Three.

Strategic Chess Game: The Nuclear Defence

The Defence Committee Meeting of 7 March was the crucible which distilled the extent of fundamental disagreement between DEA and the bomb lobby's champion, Sir Philip Baxter.¹¹ The tenor of the meeting, and the course of its discussions, were (inevitably, given the composition of the Defence Committee) notable for their concerted and strong scepticism and criticism of DEA's assumed acceptance of the need for the NPT.

For example, Sir Philip Baxter expressed the view that, contrary to DEA assessments, the proposed NPT safeguards system was, on a number of counts, unacceptable to Australia.¹² It could, for example, be varied at will by the Board of Governors of the IAEA, regardless of Australia's wishes. Furthermore, the new NPT safeguard system would preclude the development of nuclear energy for peaceful uses, and would certainly result in an end to Australia's option of developing the ability to manufacture nuclear weapons rapidly, should that become necessary.¹³

On its own account, the Department of National Development, for the first time, raised the issue of the interpretation to be placed on the term "manufacture ... of nuclear weapons" contained in Articles I and II. Did this mean that signatories would be able to do everything short of producing a nuclear explosion? Did the restriction apply at some earlier stage? Much would depend on how this issue was resolved.¹⁴

On this point, Baxter observed - disingenuously - that, since the projected nuclear power generating station at Jervis Bay, N.S.W., would have "full manufacturing facilities", it would be subject to international inspections. As such, he asserted, many Australian companies would refuse to co-operate in its construction for fear of international and industrial espionage. It can be noted, however, that the proposed facility would have been subject to IAEA diversion safeguards inspections as a *bona fide* peaceful nuclear energy producer, and not on the basis - as Sir Philip was

¹¹ Baxter was supported, in greater or lesser degree, by representatives from the armed forces, and the Departments of Defence, National Development, Supply and Prime Minister. Document A 1838/346: TS 919/10/5, Pt. 4 [28]. (15 February 1968). *Defence Committee Meeting 7/3/68: Minute No. 19/1968: Secretary, Department of External Affairs (Sir James Plimsoll)*. Canberra: Australian Archives.

¹² *Ibid.* At p. 1.

¹³ *Ibid.*

¹⁴ *Ibid.* At p.2. The issue of the interpretation of this phrase later became of major importance in Australia/United States negotiations in Canberra on 18th and 19th April 1968.

hinting - as a producer of fissionable material for nuclear weapons manufacture. Thus, it would be no more, or less, vulnerable to the risk of espionage than any other safeguarded nuclear facility around the world. In addition, Sir Philip added, the uranium and (radioactive) beach sands mining industries would be subject to the restraint of inspection activities on all their activities. Costs involved in their compliance with inspection requirements were likely to be considerable.

As a final point, he commented that AAEC was currently working on manufacturing techniques for nuclear weapons which promised easier and cheaper manufacturing costs. It could *not* be assumed, he said, that nuclear weapons could not be made "easily and cheaply" within the next few years by countries that did not tie themselves to the treaty.¹⁵

A new defence of the nuclear weapons option came from the Permanent Secretary of the Department of Supply (Cooley), who pointed to the possibility that Australia, lacking information on the latest weapons technology, would be in danger of signing the NPT on the basis of insufficient information.¹⁶

Further, Sir Henry Bland, Permanent Secretary of the Department of Defence, reinforced the bomb lobbyists' position by suggesting that Australia could state in the General Assembly of the United Nations that, although it would not sign the treaty, it had no intention of manufacturing nuclear weapons.¹⁷

Finally, the Permanent Secretary of the Prime Minister's Department, Sir John Bunting, brought some reality to the discussion by stating that the overriding consideration within the whole debate was the effect a decision not to sign the treaty would have on Australia's alliance with the United States. Before any final decision was made, the Australian Government should discuss its ramifications with the Americans.¹⁸

At this point, having endured a sustained attack on the notion of Australia's accession to the NPT, the Permanent Secretary of the Department of External Affairs, Sir James Plimsoll, delivered his vision of a nuclear policy position which best expressed Australia's national interest. This was a seminal point in the debate, since its eventual

¹⁵ *Ibid.* At pp. 3, 4.

¹⁶ *Ibid.* At p. 4.

¹⁷ *Ibid.* At p. 5.

¹⁸ *Ibid.*

adoption and implementation would lend Australia early influence over interpretation of the terms of the NPT, and would ultimately result in Australia's active involvement in global nuclear disarmament over many years.¹⁹

Sir James said the Defence Committee should indicate that it favoured Australia's adherence to the treaty. It could also consider whether any amendments should be sought, or whether any understandings should be expressed (by Australia) on the meaning or execution of the treaty. Crucially, the matter for consideration would then be *precisely how far* these clarifications should be pressed. He reminded his listeners that the Australian Government had, for many years, indicated its belief that nuclear weapons should be kept out of the hands of those not in possession of them. This was a fundamental prerequisite of world peace.²⁰

With this in mind, Australia should not look at the treaty solely in terms of the restrictions it imposed, and the opportunities which would be foregone. Similar restrictions would be imposed on other countries that adhered to it. If Australia declined to sign, it would be saying, in effect, that West Germany, Indonesia, India and Japan should not sign either.²¹ Furthermore, and despite the attitude of the Australian Atomic Energy Commission, there was a strong likelihood that the United States would cease its co-operation with Australia in the nuclear energy field if it failed to sign the treaty.

Finally, although the inspection system outlined by Sir Philip Baxter sounded onerous, it was no more demanding than what others would have to endure if a meaningful treaty were to emerge.²²

This signal meeting ended with Chairman Bland's summation that there appeared to be three alternatives for the Government:

- sign the treaty as it stood, possibly with some statement of understandings;

¹⁹ *Ibid.* At p.4.

²⁰ *Ibid.* Document A 1838/346: TS 919/10/5, Pt. 1 [13]. (18 April 1967) *Department of External Affairs: Departmental summary papers on Australian nuclear weapons policy: 30 June 1965*. Canberra: Australian Archives.

²¹ *Supra.* At Note 19.

²² *Ibid.*

- sign the treaty but limit Australia's accession to ten years, with the possibility of an extension;
- not sign the treaty at all.²³

Speaking for the Department of Defence, Bland favoured the second alternative, on the basis that the NPT would not place great limitations on Australia over the following ten years. It would be for the Working Group to develop a clear and comprehensive policy paper which was capable of support within the Defence Committee. The paper would also later serve as the basis of a Cabinet Submission by the Ministers for External Affairs and Defence.

DEA Ascendant

DEA's commentary on the treaty's terms, which formed its contribution to the Working Group discussions, was succinct and assertive. Addressing the Articles of the new treaty consecutively, it laid out an effective starting point for further discussion by noting those terms of the treaty which were, *prima facie*, capable of clear interpretation and application. On the other hand, it also pointed to those terms which lacked clear definition, or were open to alternative interpretations.

By way of introduction, it noted that the strict application of Articles I and II could be regarded as "basic to the effective operation of the treaty".²⁴ Article I meant that, whether or not Australia signed, it could no longer hope to acquire nuclear weapons from nuclear-armed parties to the treaty, who were prohibited from transferring nuclear weapons to any recipient whatsoever. Nevertheless, Article I would not prevent the use by Australia's allies of nuclear weapons in its defence, nor their placement in Australia under the exclusive control of a nuclear power.

Conversely, Article II meant that, should Australia sign, it would be prevented from receiving nuclear weapons or devices, or control over such weapons or devices

²³ *Ibid.* At p. 5.

²⁴ Document A 1838/346: TS 919/10/5. Pt. 2 [24] (9 February 1968). At p. 2. See also: Document A 1838/346: TS 919/10/5, Pt. 5 [34]. Canberra: Australian Archives. For the text of the NPT, see Appendix II.

"from any transferor whatsoever". It would also be prohibited from "manufacturing" weapons or other nuclear explosive devices.²⁵

DEA gave the provisions of the important Article III on safeguards arrangements a more comprehensive, though non-technical, treatment. In its assessment, the Department pointed out that, following its accession to the NPT, Australia would be required to conclude a separate Safeguards Agreement with the International Atomic Energy Agency. That agreement would be "in accordance with" the IAEA's statute and existing safeguards system, and would be for "the exclusive purpose" of verifying the fulfilment of obligations.²⁶ Furthermore, safeguards were to apply to all source or special fissionable material (whether or not it was within a principal nuclear facility) in all peaceful nuclear activities.

As DEA readily acknowledged, these provisions demanded explanations from the United States of the precise meaning of such phrases as "safeguards system", "principal nuclear facility", "all source or special fissionable material" and "all peaceful nuclear activities". Paragraphs 2 and 3 of Article III provided that only nuclear material and equipment subject to NPT safeguards could be supplied to a non-nuclear weapon state, but that such safeguards should *not* act to hinder economic or technical development and international co-operation related to nuclear energy used for peaceful purposes. As DEA noted, this requirement did not apply to the declared nuclear weapon states, although the United States and the United Kingdom had agreed to open their peaceful-use nuclear facilities to safeguards procedures. The question for resolution here, DEA suggested, was exactly *how* safeguards procedures could avoid hampering peaceful nuclear developments - admittedly a question for those with relevant technical expertise.²⁷

The final paragraph of Article III dealt with time limits for entry into force of separate Safeguards Agreements between states and the IAEA. Their negotiation and conclusion were to take no longer than two years and (as previously mentioned) did not apply to the nuclear weapon states.

In DEA's view, Article III sought a balance between the competing claims of a formula "broad enough to gain general support and one that is so precisely defined as to

²⁵ *Ibid.* At pp. 1, 2.

²⁶ *Ibid.* At p. 2.

²⁷ *Ibid.* At p.3.

leave no possible loopholes".²⁸ The result was that much detailed work remained to be completed between individual states and the IAEA in negotiations over the terms of individual Agreements. Although concerns had been expressed - particularly by the Federal Republic of Germany - that the Article opened the way for industrial espionage, DEA asserted that the treaty text now met most of their (unspecified) concerns on this score.²⁹

On Article IV, which sought to protect the "inalienable right" of non-nuclear states to develop the research, production and use of nuclear energy for peaceful purposes without discrimination, DEA allowed itself a measure of sympathy with the views of India and Brazil. Both "threshold" nuclear states, they had alleged that this was a hollow right, given the fact that the non-nuclear weapon State Parties would be unable to explode nuclear devices for peaceful purposes on their own account. This, they alleged, discriminated against non-nuclear powers in the use of nuclear devices for peaceful purposes.³⁰

As DEA pointed out, however, this question was taken up in Article V, which called on the declared nuclear states to help the non-nuclear parties with the "peaceful applications of nuclear explosions" on a non-discriminatory basis through the provision of a nuclear explosion "service".³¹ Here, a crucial point was the reconciliation of this "service" with the 1963 *Partial Test Ban Treaty*,³² which banned, *inter alia*, nuclear explosions in the atmosphere and under water.

Article VI mandated an obligation on each of the parties (not merely the declared nuclear weapons states) to pursue negotiations on effective measures relating to the cessation of the arms race "at an early date". It also called for the conclusion of a treaty on "general and complete disarmament".³³ As DEA noted, such a requirement

²⁸ *Ibid.* At p.4.

²⁹ *Ibid.*

³⁰ *Ibid.* At p. 5.

³¹ *Ibid.* The Department noted that the US programme to develop such uses (for example, in harbour construction, and hydro-carbon recovery) - known as Operation Plowshare - was still in its early stages, and had not yet conclusively demonstrated any economic or feasible uses of peaceful nuclear explosions. Since the advent of the nuclear age, no peaceful-use nuclear explosions have ever been attempted.

³² *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water* [480 UNTS 43; U.K.T.S., No. 3 (1964) Cmd 2245].

³³ *Supra.* At Note 10, p. 6.

imposed no time limits on States Parties, and was not a particularly strong obligation. It was essential, nevertheless, to the success of the NPT because few non-nuclear weapon states were likely to agree to renounce their future possession unless the five declared nuclear weapon states made a commitment, however amorphous, to eliminate their own arsenals.

Finally, Article VII maintained a right for parties to establish nuclear-free zones though regional treaties (a non-controversial provision, in DEA's view).

These provisions represented the operative terms of the treaty, and were supplemented by a number of procedural provisions relating to amendment of the terms of the treaty and five-yearly Review Conferences (Article VIII), as well as signature, ratification, entry into force, indefinite extension after twenty-five years, and conditions for withdrawal (Article IX).³⁴

The DEA commentary ended with an assessment of the perceived attitudes to the NPT text of the more significant nuclear threshold states, since their accession to the treaty would be a central consideration for Cabinet when forming its views on Australia's own position. Briefly, DEA found that West Germany had not yet decided whether to sign, in view of its concerns over delays in concluding a Safeguards Agreement between the IAEA and the European Atomic Energy Community ("Euratom"). India was a doubtful potential signatory, given its stand against the treaty's inherently discriminatory nature, while Brazil harboured doubts based on fears over safeguards inspections which compromised its sovereignty. Furthermore, Sweden was looking for more concrete pledges from the nuclear powers on nuclear disarmament, while France saw the treaty as irrelevant to its own nuclear programmes. Finally, Japan regarded the treaty as lacking any firm security guarantees from the declared nuclear powers.³⁵ In short, the treaty - at this stage - lacked general support from many of the nuclear threshold states whose possible nuclear ambitions were to be its most important target.

³⁴*Ibid.* At pp. 6-8. In the final text of the treaty, submitted to the Eighteen Nations Disarmament Committee on 11 March 1968, the treaty's terms relating to withdrawal and indefinite extension were incorporated in a separate Article X. At Appendix II.

³⁵*Ibid.* At pp. 9-11.

DEA's overview of the operative terms of the NPT were supplemented by its own review of the strategic reasons behind the treaty's global importance - the central reason for its firm commitment to stemming nuclear diffusion through treaty-making.³⁶ The core of its reasoning can be seen when it examined why the United States and the Soviet Union had sought to conclude an agreement of such "historic significance" on nuclear proliferation:

The devastating power and other effect [sic] of nuclear weapons are such that those threatened by them can fear the substantial destruction of their society; the general use of nuclear weapons could threaten the survival of the human race. There is therefore universal agreement of [sic] the desirability of avoiding nuclear war. Restraint by established nuclear powers and the avoidance of further proliferation of nuclear weapons are obvious measures to reduce the risks. *The Australian Government has consistently recognised the dangers of proliferation and called for measures to prevent or control it.* (emphasis added)³⁷

Such a clear and persuasive argument against any move within Australia to develop an ability to build nuclear weapons, in defiance of the wishes of the United States, was not weakened by its failure to acknowledge just such a desire among some influential Australians.

In DEA's view, the multiplication of states fielding a credible nuclear threat would have serious implications for the delicate balance of both Superpowers' nuclear deterrence strategy, by introducing elements of uncertainty caused by imperfect knowledge of the intentions of new nuclear powers or the risk of "accidental or unauthorised action". As a result, DEA concluded, a systemically stable global balance of mutually assured destruction could become seriously unstable.³⁸

In addition, should Australia decide to press ahead with plans to build its own nuclear deterrent force, it would have to face the possibility, whether distinct or ill-defined, that its defence alliance with the United States under the ANZUS Treaty would be at an end. On the other hand, continued support by Australia for the stable nuclear monopoly held by the "Great Powers", and - importantly - the continued frustration of Communist China's assumed nuclear ambitions, was clearly in its national interest.³⁹

³⁶ Document A 1838/346: TS 919/10/5, Pt. 4. [8]. *Rationale for the NPT*. (March 1968). Canberra: Australian Archives (Top Secret Austeo).

³⁷ *Ibid.* At p. 1.

³⁸ *Ibid.* At pp. 1, 2.

³⁹ *Ibid.*

DEA continued its devil's advocacy by introducing the variety of possible factors weighing against Australian support for the NPT. As it had done in its earlier internal policy appraisals, it was able to dismiss most of these through clear and careful argument. Its first concern focused on the treaty's prospects for support, noting the wary attitudes of major non-nuclear weapons states such as West Germany, Italy, Japan and India.

In DEA's opinion, Australian accession to the treaty should be predicated not only on it attracting the minimum requirement of forty signatories - in addition to the three depository states - called for in Article IX. It should also depend on those signatory states comprising the bulk of those which were capable of the rapid development of nuclear weapons.⁴⁰ Without this, the prospects for a successful treaty were, it judged, remote. In any event, should Australia decide "at a fairly early stage" that, on balance, the treaty commanded its support, it would be in its interest to declare this, and then work for support among other nations.⁴¹

DEA went on to enlist the support of the Joint Planning Committee of the Department of Defence, whose study *An Independent Australian Nuclear Capacity: Strategic Considerations*⁴² recommended that Australia should *not* seek to acquire nuclear weapons. As DEA noted, that conclusion was, in part, based on the most recent assessment of the Joint Intelligence Committee on threats to Australian security over the next decade.⁴³

The latter assessment had concluded that Communist China's growing nuclear weapon programme was a significant, if indefinable, threat to Australia at some future time.⁴⁴ As Australia's most credible nuclear threat, China could not be deterred by any nuclear force which Australia could hope to establish. In fact, a credible deterrent force would have to be substantially stronger than that of the United Kingdom or France,

⁴⁰ *Ibid.* At p. 3.

⁴¹ *Ibid.*

⁴² *Ibid.* At p. 4.

⁴³ See Document A 1838/346: TS 919/10/5, Pt. 5 [34], *Defence Committee: Non-Proliferation Treaty: Agendum No. 9/1968: Annex A: Note by Joint Intelligence Bureau.* (18 March 1968). Canberra: Australian Archives. At pp. 1A - 8A. Classified Top Secret.

⁴⁴ *Ibid.* The Joint Intelligence Committee had concluded that China would, by 1972, possess "several hundred" weapons of various yields, including missile warheads and bombs. By the mid-1970s it was expected to be able to produce intercontinental ballistic missiles (ICBMs) to deliver a nuclear strike. At p. A8.

clearly (in its view) an impossible assignment.⁴⁵ Furthermore, the concentration of Australia's population and industrial production in a few large cities guaranteed their swift elimination in any nuclear conflict.⁴⁶ In these circumstances, Australia had no choice but to rely on the United States to deter Communist China (and any other potential aggressor) from contemplating a nuclear strike on its territory.

In the Joint Planning Committee's assessment, the growth of China's nuclear capability required closer ties with the United States, rather than disengagement from the American alliance. In simple terms, a workable Nuclear Non-Proliferation Treaty was Australia's best option to ensure its strategic security.⁴⁷

AAEC Descendant

DEA's contribution to the policy consolidation process laid a strong foundation for the Defence Committee's forthcoming consideration of NPT issues. Its hand was further strengthened by the reply it had received from the United States Arms Control and Disarmament Agency (ACDA) in response to queries on the major concerns expressed by the Australian Atomic Energy Commission over safeguards requirements. On this score, J.L. Allen (an officer in the Economic Relations Branch of DEA) again reveals the personal perspective behind the official record:

Of course we realised that they wouldn't listen to us if we tried ourselves to shoot their arguments down. So we [listed] the Commission's criticisms and [requested] Washington's comments thereon. The Arms Control and Disarmament Agency (ACDA) drafted its replies and then cleared their terms with the USAEC [United States Atomic Energy Commission]. The result was Washington's telegram 694. Coming as they do from such an authoritative source (ACDA plus USAEC), these replies can obviously be taken as coming from the horse's mouth itself!⁴⁸

⁴⁵ *Supra*. At Note 36, pp. 4, 5.

⁴⁶ *Ibid*. At p. 5.

⁴⁷ *Ibid*. At p. 7.

⁴⁸ Document A 1838/346: 719/10/6, Pt. 3. [168]. *Personal letter from J.L. Allen to W.B. Pritchett, Assistant Secretary, Defence Liaison Branch, DEA*. (11 March 1968). Canberra: Australian Archives. The cablegram referred to by Allen (Inward Cablegram 964 dated 7 March 1968) reflected, in more precise terms, the US position on the terms of the NPT which it subsequently laid out in its *Aide-Memoire* to the Australian Government of 25 March 1968: Document A 1838/346: TS 919/10/5, Pt. 6. Canberra: Australian archives.

It was to DEA's advantage that America's principal agencies with responsibility for the negotiation and entry into force of the NPT largely agreed with its own earlier repudiation of the Commission's objections to the treaty's terms. Those objections had been set out in the Australian Atomic Energy Commission's complementary paper on the implications for Australia of the projected terms of Article III (covering nuclear material diversion safeguards) which was later included in the Working Group's deliberations. Its major points have been examined in depth in Chapter Three.⁴⁹

DEA's response had been to seek immediate clarification from ACDA on the most serious of the Commission's objections.⁵⁰ Apart from its effect in rebuffing many of the Commission's less supportable claims, DEA's action in questioning the United States on its interpretation of these aspects of the Draft Text was an early example of Australia's resistance against mute acceptance of a new and immensely important arms control measure.

In fact, it was the efforts of the advocates of an independent Australian nuclear deterrent which, ironically, led instead to the weakening of their position. By pushing for a more independent nuclear policy stance, the bomb lobby in fact reinforced Australia's dependence on its nuclear relationship with America, while creating the opportunity for Australia to show leadership in the interpretation of a treaty which they considered unnecessary and dangerous. Through their efforts, the nuclear advocates forced their opponents to demonstrate the flaws inherent in their proposals for an independent nuclear deterrent strike force. For example (as mentioned earlier) Australia could not hope to field a nuclear force sufficiently strong to present a credible deterrent against a nuclear attack from China. Nor would any nuclear strike force deter acts of aggression at the level of covert infiltration, or the like.

Notwithstanding the earlier interpretations on NPT safeguards provisions given to Australia by the United States in its *Aide-Memoire* of 13 November 1967⁵¹ (see Chapter Three) ACDA's response effectively disposed of the most important objections

⁴⁹ Document A 1838/346: TS 919/10/5, Pt. 3 [134]. *Australian Atomic Energy Commission: Treaty on the Non Proliferation of Nuclear Weapons: Article III: Safeguards: Implications for Australia*. (29 February 1968). Canberra: Australian Archives.

⁵⁰ Document A 1838/346: TS 919/10/5, Pt. 5 [26]. *Department of External Affairs Outward Cablegram No. O. 14234*. (28 February 1968). Canberra: Australian Archives.

⁵¹ Document A 1838/346: 719/10/6, Pt. 3 [175]. *Department of External Affairs Inward Cable No. I 75911*. (15 November 1967). Canberra: Australian Archives.

made against them by the Australian Atomic Energy Commission. First, contrary to the Commission's assertion, Australia would not be bound by any amendments imposed "from time to time" by the US or the Soviet Union. Any changes to an individual Safeguards Agreement could be applied by the International Atomic Energy Agency only with the consent of both parties to it. Provisions for any amendment would be set out in the agreement, and would not be subject to *ad hoc* action by the Superpowers.⁵²

Second, the Commission had asserted that the presence of safeguards inspectors from the Euratom and Comecon states (which would themselves be allowed, under the terms of Article III (4) of the NPT, to restrict inspection of their peaceful nuclear facilities to their own personnel) would be a serious industrial espionage threat to Australia.⁵³ ACDA had replied that the IAEA was bound by its Statute to ensure that industrial or commercial secrets were not disclosed through its activities.⁵⁴

On the general question of the acceptability to Australia of individual inspectors (for example, individuals from the Soviet Union or its allies) and the Commission's presumption that a right of rejection would be abolished, ACDA had stated that it believed that right would remain. Any inspector who was unacceptable to Australia could, therefore, still be replaced.⁵⁵ On the question of the costs associated with the implementation of the NPT safeguards system, DEA stated that ACDA considered the Commission's total costing for all states of \$150-\$200 million within a few years as "excessive".⁵⁶

In regard to the extent of safeguards inspections, which the Commission suggested would encompass all commercial, industrial and experimental uses of nuclear materials, as well as the mining and milling of uranium and other ores, the American agency had assumed that safeguards would apply only at the final point in the mining

⁵² Document A 1838/346: TS 919/10/5, Pt. 3 [131] *Australian Atomic Energy Commission: Treaty on the Non Proliferation of Nuclear Weapons: Article III - Safeguards implications for Australia*. Canberra: Australian Archives. At p. 2. Document A 1838/346: TS 919/10/5, Pt 6.[27]. *Department of External Affairs. Non Proliferation of nuclear weapons*. (6 March 1968). Canberra: Australian Archives.

⁵³ *Ibid.*

⁵⁴ *Statute of the International Atomic Energy Agency*, Article VII F. *Australian Treaty Series* (1957), No. 11. Canberra: Australian Government Publishing Service. At Appendix III.

⁵⁵ *Supra*. At Note 52.

⁵⁶ *Ibid.* Document A 1836/346: TS919/10/5, Pt. 6 [27]. At p. 3.

process. Since this was the oxide concentrate stage, ACDA assumed that uranium mining operations would *not* be subject to safeguards inspections.⁵⁷

Finally, DEA observed that, contrary to the Commission's view, Australia was unlikely to be required to open its defence establishments to inspections. This would include any future warships with nuclear propulsion which, the Commission had argued, could be described as "equipment furthering a military purpose" under the terms of the Statute of the I.A.E.A.⁵⁸

In summary, the United States Arms Control and Disarmament Agency, with the concurrence of the United States Atomic Energy Commission, had supported and reinforced the negative assessment of the Department of External Affairs on the merits of the objections raised by the Australian Atomic Energy Commission against the terms of the NPT. By doing so, ACDA had contributed to the accelerating process of nuclear policy consolidation within the Australian Government by lending authority to DEA's active resistance against Australia's nuclear warriors. That process would find its defining moment - though not its resolution - in the completion of a consolidated paper by the Working Group for consideration in the Defence Committee.⁵⁹

Making the Nuclear Choice

The alternative courses of action open to Australia were clearly set out in the consolidated Working Group paper.⁶⁰ Taking into consideration the range of strategic, industrial, economic, technical and military concerns already expressed, they consisted of appraisals of the three choices broadly suggested by Secretary Bland in the Defence Committee meeting of 7 March 1968. As such, they represented a gauge of the limited extent to which the NPT advocates at DEA, with little help from elsewhere within government, had begun to prevail over the bomb lobby's nuclear warriors. The three alternative courses of action were:

⁵⁷ *Ibid.*

⁵⁸ At Article XII (A) (1).

⁵⁹ *Supra.* At Note 43.

⁶⁰ *Ibid.*

- Sign the treaty without reservations.

Immediate signature of the treaty following its opening for signature was not recommended by the Working Group. The meaning of the term "manufacture" in Articles I and II was insufficiently understood, and could result in states being permitted to move closer to a nuclear weapons capability than the treaty intended.

Furthermore, the system of safeguards to be established in terms of Article III would not be known at the time of signature (a model Safeguards Agreement for use between the International Atomic Energy Agency and individual states did not yet exist). In addition, the Working Group Report expressed reservations over the difficulty in obtaining amendments to the text of the treaty (as provided for in Article VIII).

Finally, doubts over the level of support for the treaty from near-nuclear capable states, and others of special strategic interest to Australia, was another impediment to immediate signature.⁶¹

- Decline to sign the treaty.

The primary consideration in a decision not to accede to the NPT would be its effect on Australia's relations with the United States. The Report noted that:

.... [t]he United States can be expected to exert considerable pressure for signature of the Non-Proliferation Treaty; it will certainly be looking for full support from its close partners and those dependent upon its protection.⁶²

It added that a refusal to sign on security grounds, with a view to maintaining an alternative, independent nuclear deterrent, would carry little weight in Washington. One of the United States' main arguments was that the NPT would consolidate its commitment to Asia, and hence to Australia's protection. Nor would a rejection of the treaty on the grounds of diminished potential for peaceful nuclear development be seen as legitimate, given the continued existence of the 1956 *US/Australia Agreement for Cooperation concerning Civil Uses of Atomic Energy*, although it would be necessary to obtain clear assurances of future US technical assistance and support under the

⁶¹ *Ibid.* At p. 32.

⁶² *Ibid.* At p. 33.

agreement.⁶³ The result of a refusal to accede to the NPT would, in all probability, be the application of a range of pressures and sanctions from Washington in a number of fields, not the least being possible loss of assistance in nuclear technological development and refusal of the sale of military equipment.

Inevitably, a refusal to sign would invite widespread assumptions around the world that Australia intended to build nuclear weapons, while lending assistance to those states that were looking for a reason to avoid the obligations of the treaty. In the end, the choice lay between acceptance of the assurances of its closest friends and allies (the United States and the United Kingdom), and a course of action that would bring Australia into conflict with them. The Working Group Report concluded that such a choice need not be made at this stage, given its third (favoured) option.⁶⁴

- Indicate a willingness to sign the treaty subject to understandings, qualifications and possible amendments.

The third option represented the most favourable consolidated policy position attainable by DEA. The reservations it expressed were not entirely due to the sway of Baxter and his supporters in government circles, since legitimate doubts existed on several fronts - such as the prospects of attracting an adequate number of important signatory states.

Nevertheless, the Report saw this option as the most appropriate way in which to resolve Australia's difficulties with the text of the treaty. A number of states, particularly those with a potential nuclear capability, would, like Australia, be seeking a range of clarifications of the treaty text, and may well press for qualifications or amendments to it. To sign immediately and without reservations would therefore be premature. This was especially so in view of the fact that its sponsors (the United States, the United Kingdom and the Soviet Union) had "shown themselves responsive to pressures for amendments from states finding difficulties in accepting the obligations of the treaty".⁶⁵

⁶³ *Ibid.* [ATS 1957, No. 8; 238 UNTS 275; TIAS 5830].

⁶⁴ *Supra.* At Note 43, pp. 32-35.

⁶⁵ *Ibid.* At p. 36.

As far as the scope of Australia's anxieties was concerned, it was significant for Australia's final decision on treaty accession that DEA was, as discussed above, already in possession of United States Government views on several questions put to it by Australian diplomats in Washington in late February 1968.⁶⁶ Of those, some anticipated (as DEA knew they would) questions which a consolidated policy position paper, incorporating the views of the Australian Atomic Energy Commission, could not avoid.

The American interpretations would prove useful in the negotiations held between Australian and US Government representatives in Canberra during the following month. However, notwithstanding future negotiating tactics, policy consolidation required that the Working Group acknowledge the principal *legitimate* concerns of both the bomb lobby *and* its opponents at DEA. In this way, the list of those concerns set the agenda of the bilateral talks, at least from Australia's point of view, and were the fulcrum on which Australia exercised its unexpected leverage over the surprised Americans.

Here, then, was a policy compromise; the protagonists agreed that a number of issues required urgent clarification from the United States. The main areas of concern could now be more clearly defined:

- What, precisely, did the term "manufacture ... of nuclear weapons ..." in Articles I and II prohibit signatory states from doing?
- Would diversion safeguards be applied to Australia's mining and milling of uranium and other radioactive minerals? What were the implications of safeguards procedures for commercial and national espionage?
- How would the IAEA's obligations under its Statute affect its application of the safeguards provisions of Article III of the treaty?
- Would the treaty attract sufficient support from appropriate (i.e., near-nuclear and East Asian) states to warrant Australia's accession to it?
- On what basis would the peaceful-use nuclear explosion service proposed in Article V be provided to Australia, given the present stage of Australia's national development?

⁶⁶ Document A1838/346: TS919/10/5 [9]. (1 March 1968). DEA: *Draft treaty on the non-proliferation of nuclear weapons*. Canberra: Australian Archives. Classified Secret and Guard. The document begins: "This paper summarises the answers to questions about the draft treaty on the non-proliferation of nuclear weapons asked in cablegrams 627 and 803 to Washington and repeated to other posts".

- Would Australia, under the terms of the treaty, be able to acquire nuclear propulsion plants for civil or military use in the future?
- How could the rigid amendment process established by Article VIII (1) and (2) be made more flexible?
- What more appropriate period could be substituted for the present duration of the treaty?⁶⁷

End Game: The Role of Cabinet

By March 1968, the approaching conclusion of long negotiations over the terms of the NPT at Geneva, and the treaty's subsequent debate in the UN General Assembly, both demanded that the Australian Cabinet begin urgently to formulate its responses to the wide range of issues inherent in a multilateral nuclear non-proliferation treaty. Each decision would bear upon a broader and more fundamental question. In the final analysis, did Australia's national interests lay in signing and ratifying the NPT, as the United States expected it to do? If not, what alternative courses of action were open to Australia in the short and medium terms?

Cabinet decisions on these questions were enlightened and informed by a series of extensive and complex Cabinet Submissions, the result of the distillation of internal policy planning within government departments and agencies.⁶⁸ They initially comprised two joint submissions - one by the Departments of Defence and External Affairs,⁶⁹ and another from the Departments of Trade and Industry and National Development.⁷⁰ In addition, and in response to Cabinet's request for further study and

⁶⁷ *Supra*. At Note 43, pp. 36, 37: paragraph 93.

⁶⁸ The form and substance of the internal policy planning processes undertaken by the Australian Atomic Energy Commission and the Department of External Affairs has been described in Chapter Three.

⁶⁹ *Cabinet Submission 25/1968: Nuclear Proliferation Treaty*. 22 March 1968. Canberra: Australian Archives. Available [on-line]: WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Decision_95_1.htm [36].

⁷⁰ *Cabinet Submission 47/1968: Joint submission by Ministers for Trade and Industry and National Development - Nuclear non-proliferation - safeguards*. 4 April 1968. Canberra: Australian Archives. Available [on-line]: WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Decision_119_1.htm [47].

advice,⁷¹ the Defence Committee, now augmented by the Permanent Heads of the Departments of National Development, Supply, and Trade and Industry, and the Australian Atomic Energy Commission, produced a final Report (in the form of a third Cabinet Submission) on the brief to be given to the Australian Delegation at the forthcoming UN General Assembly debate on the treaty.⁷²

The content and effects of the various Submissions and Cabinet Decisions will be discussed below. However, before the final Defence Committee Report could be considered by Cabinet, it was overtaken by events as DEA's opportunity to prevail finally arrived.

The United States Secretary of State, Dean Rusk, visited Canberra during early April 1968 for bilateral talks, the agenda for which included the Draft NPT text. The result was that the United States Government was now without any doubt, at the most senior Cabinet level, about the depth of Australia's concern over its implications. This was clearly reflected in Cabinet Decision 119 of 9 April 1968:

Mr Rusk left no doubt about the importance which the United States attaches to the establishment of the Treaty, but at the same time it was made clear to him that although the United States assessment of importance would be taken into close consideration, it must in the end be Australia's own total assessment which would determine its attitude.⁷³

Nevertheless, the Australian Cabinet was willing to take advantage of Secretary Rusk's offer of more detailed negotiations. To that end, "[a]ppropriate senior United States officials" would be made available to discuss with Australian officials those aspects of the NPT which Australia "view[ed] with concern".⁷⁴ Cabinet Decision 119 also called for the augmented Defence Committee to ensure the full canvassing of all NPT issues at the forthcoming talks, and to prepare a draft of instruction to be given to Australia's UN

⁷¹ *Cabinet Minute. Canberra, 26 March 1968: Decision No. 95.* Available [on-line]: WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Decision_95_18.htm [39]. Document A 5619/1: 648, Pt. 1[41]. *Cabinet Minute. Canberra, 9 April 1968: Decision No. 119.* Cabinet's decision was, in essence, that it could support the ideals of the treaty text, but held grave concerns on a number of implications for Australia if accession went ahead without resort to a number "amendments, understandings and qualifications" (paragraphs 4 and 6). Those concerns, which had been briefly dealt with by Cabinet Submission 25 at paragraph 104 (at Note 69) required further study by the Defence Committee [through its Working Group] before any firm decisions on the treaty could be made.

⁷² *Cabinet Submission 69/1968: Non-Proliferation Treaty.* 26 April 1968. Available [on-line]: WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_1.htm [50].

⁷³ *Cabinet Minute. Canberra, 9 April 1968: Decision No. 119* [41]. Canberra: Australian Archives.

⁷⁴ *Ibid.*

Delegation in New York. The need for Australia to state its position in the First Committee of the Twenty-Second United Nations General Assembly, probably in mid-May, now left little room for error or delay.

On 26 March 1968, while Cabinet awaited the outcome of the talks and subsequent advice from the Defence Committee on possible courses of action at the UN, Minister for External Affairs Paul Hasluck addressed the House of Representatives.⁷⁵ In a wide-ranging speech on foreign policy issues and priorities, Hasluck made detailed reference to the new NPT, thus bringing the Government's interim policy position into the public domain. While specifically declining to define any settled position, Hasluck reiterated the nature and scope of Australia's doubts over the treaty, emphasising in general terms that:

.... the basic approach of the Australian Government is that we want an effective and equitable treaty on the non-proliferation of nuclear weapons, provided that it does not endanger our future national security and hamper our development, and we therefore want the nations of the world to arrive at *a text of an effective treaty which we can support and adhere to* (emphasis added).⁷⁶

It should be re-emphasised here that the documentary evidence of the development of policy on the non-proliferation of nuclear weapons by the Department for External Affairs is almost completely devoid of contributions from its Minister. This leads to doubt about the degree to which Hasluck, at least at this stage, had been involved in the development of the national security strategy which his speech outlined. As the responsible Minister, Hasluck was bound to state Government policy to the Parliament. Nevertheless, the refusal of the Government actually to sign the treaty on its opening for signature on 1 July 1968, *even taking account of the interpretative clarity and security assurances it then possessed*, must lead to the conclusion that Hasluck's words on 26 March were little more than extemporisation.

That judgment is reinforced by Hasluck's notation on a Minute from M.R. Booker, First Assistant Secretary in Division II of DEA. Booker noted that the programme planned for the visiting US Mission included an opportunity for Ministers themselves to become involved in discussions. Hasluck's response to Booker on his

⁷⁵ Australian foreign policy. (1968). *Current Notes on International Affairs*, 39 (3), pp. 81-91. At pp. 89-91.

⁷⁶ *Ibid.* At p. 90.

intentions in this regard was an abrupt and emphatic "No".⁷⁷ At the same time, Hasluck refused to allow DEA to issue a ministerial press statement designed to assuage anticipated press speculation on the reason for the US Mission's visit.⁷⁸

Both actions lend substance to the conclusion of Hasluck's political biographer, Robert Porter, that he failed, at times, to take adequate account of the advice he received from his department, whose senior officers he preferred to keep at arm's length.⁷⁹ They also reinforce Porter's conclusion that Hasluck's "strong and clear views on policy and policy formulation",⁸⁰ and the fact that he tended to concentrate on the broad sweep of international relations, led him to neglect the specific influences acting on a particular situation.⁸¹

It is not unlikely that stronger support and closer engagement by the Minister for External Affairs in the questions raised by the NPT draft text would have resulted in Australia's earlier accession. By the same token, however, Australia's ability to exercise influence over the terms of the treaty would have been correspondingly reduced.

As will later become clear, the non-proliferation seeds planted by DEA during the early months of 1968 - the exercise of influence over multilateral nuclear arms control measures - did not finally flower until the election of the Whitlam Government in December, 1972.

Resisting America: Diplomacy and the Politics of Leverage

The United States' four-man negotiating Mission, sent by Secretary of State Rusk to convince Australia of the merits of the NPT, consisted of its leader, Herbert Scoville (Assistant Director, US Arms Control and Disarmament Agency Bureau of Science and Technology), George Bunn (General Counsel, ACDA), Howard C. Brown (Senior

⁷⁷ Document A 1838/346: TS 919/10/5, Pt. 7 [43]. (16 April 1968). *ACDA - USAEC Mission's visit. Ministerial minute*. Canberra: Australian Archives.

⁷⁸ *Ibid.*

⁷⁹ Porter, R. (1993). *Paul Hasluck: A political biography*. Nedlands: University of Western Australia Press. At p. 276.

⁸⁰ *Ibid.* At p. 275.

⁸¹ *Ibid.* At p. 276.

Assistant General Manager, United States Atomic Energy Agency) and Allan M. Labowitz (Special Assistant for Disarmament, USAEC).⁸²

Secretary Rusk explained that Scoville, Brown and Labowitz had been key members of a similar team sent to Japan in November 1967 for comparable discussions with the Japanese Government. In addition, Brown had broad responsibilities within the United States Atomic Energy Agency for peaceful nuclear programmes, while Bunn, who was Deputy Chairman of the US Delegation to the Eighteen Nation Disarmament Committee negotiations in Geneva, had been a key drafter of the text of the Draft NPT.⁸³ Rusk believed that the delegation "should be able to satisfy Australian concerns at all levels".⁸⁴

A further step along the road to nuclear policy consolidation was taken through the production, by the Drafting Group of the Defence Committee, of a set of confidential "Notes for use by Australian officers" incorporating a set of "suggested Australian positions" in the forthcoming negotiations.⁸⁵ This document represents the first point at which a consolidated Australian policy position on the NPT could be precisely defined. Even so, it contained many concerns still harboured by the Australian Atomic Energy Commission (especially on diversion safeguards arrangements), notwithstanding the earlier detailed diplomatic responses of the United States Arms Control Agency. Australia's nuclear warriors, at AAEC and elsewhere, were dying hard.

The Summary Record of the substantive negotiations between the US Mission and Australian bureaucrats reveals the reaction of the Americans to Australia's consolidated policy position.⁸⁶ Together with the Australian negotiating instructions, it

⁸² Document A 1838/346: TS 919/10/5. Pt. 6 [42]. (11 April 1968). *Telegram 144922: Secretary of State Rusk, Washington DC to U.S. Embassy, Canberra*. Canberra: Australian Archives.

⁸³ *Ibid.* It is unlikely that DEA officers were aware that George Bunn had laid out his own analysis of the latest NPT draft text in a speech made on 12 February 1968 at the University of Wisconsin Law School. It formed the basis for his published commentary on its structure, merits and difficulties, including his analysis of its primary effectiveness in restricting the military use of nuclear energy. Bunn, G. (1968). The Nuclear Nonproliferation Treaty. *Wisconsin Law Review*, 1968 (3), pp. 766 - 785. At pp. 778 - 781.

⁸⁴ *Ibid.*

⁸⁵ Document A 1838/346: TS 919/10/5, Pt 7 [46]. *Notes for use by Australian officers in their discussions on Thursday, 18 April 1968, with [the U.S. Mission]*. Canberra: Australian Archives. Classified Secret.

⁸⁶ Document A 1838/346: TS 719/10/6' Pt. 5 [158]. *Meeting of officials of the United States and Australian Governments, Department of External Affairs, Canberra, 18th-19th April, 1968: Summary record*. Canberra: Australian archives. Classified Secret.

establishes the exact course of negotiations, and pinpoints those areas of treaty interpretation on which the US Mission was prepared to concede ground, accommodate Australian anxieties, or add clarification. The Mission's willingness to do so is evident from the record of negotiations, and is explicable, at least at this initial stage, by the real sense of urgency which the Americans brought to the negotiating table. As its leader, Scoville, noted at one point:

[t]he US [feels] very strongly that time [is] ... running out for the treaty.⁸⁷

Later, when discussing the possibility of states failing to declare all stocks of materials subject to safeguards, immediately prior to concluding a Safeguards Agreement with the IAEA, Scoville commented that:

.... [it is] possible for states to prepare for the entry into force of the treaty by hiding away material. This show[s] how important it [is] to get the treaty signed quickly. Few countries [can] put material aside now; in four or five years more [will] be able to do so.⁸⁸

Australia was the only English-speaking country in the Western Alliance which remained to be convinced of the urgent necessity of bringing the NPT into force. America's European allies in the North Atlantic Treaty Organisation had each already concurred, either at the Geneva negotiations or in bilateral discussions.⁸⁹

Nevertheless, a refusal by Australia to accede would, as Sir James Plimsoll had pointed out to the Defence Committee, send a signal to non-aligned and non-NATO near-nuclear states (such as India, Pakistan, Indonesia, Japan and South Africa) that their failure to accede would be accepted (even if it was not *acceptable*) by the United States and its NATO allies.

⁸⁷ *Ibid.* At p. 7, paragraph 24; p. 11, paragraph 45. Scoville commented during the negotiations of 18th and 19th April that the US felt that any delay in instituting the NPT would lend scope for non-nuclear states to "raise the ante" by, for example, insisting on immediate nuclear disarmament by the declared nuclear weapon states. The approaching Conference of Non-Nuclear Weapon States would be an opportunity for that to occur. In these circumstances (and the fact that France did not intend to sign the NPT) the US was anxious to have the treaty enter into force without delay.

⁸⁸ *Ibid.* At p. 29, paragraph 162.

⁸⁹ West Germany and Italy had expressed the most serious concerns over the terms of the Draft NPT text over, for example, the effect of the treaty on peaceful uses of nuclear energy, the disruptive effects of safeguards arrangements, and the need to see progress on wider arms control measures pursuant to Article VI. *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At pp. 63 - 76: Concerns of Non-Nuclear-Weapon Nations.

A further pressure evident on the United States was its concern over the forthcoming Conference of Non-Nuclear Weapon States, to be held in Geneva from 29 August to 28 September 1968. Should the Conference decide that a *quid pro quo* (such as a demand for strict guarantees from the declared nuclear weapon states against the use of nuclear weapons) was necessary for the agreement of non-nuclear weapon states to the NPT, the subsequent delays involved might mean a loss of momentum, and the end of the treaty.⁹⁰

It was in this atmosphere of urgent need for full Western Allied consensus on the acceptability of the treaty, at an early date, that the Canberra negotiations were conducted. Its presence gave Australia's negotiators a powerful point of departure in its internally-generated search for interpretative clarity from the United States.

The talks began with a review of the global pattern of support for the aims of the draft treaty, and the projected course of the debate in the United Nations General Assembly leading (as the US hoped) to its endorsement and opening for signature.⁹¹ In terms of prospects of support, it was significant for Australia that the US side regarded the treaty's fate at the UN as revolving around the decisions of the near-nuclear states - those countries with the ability to acquire nuclear weapons, should they decide to do so.

Many states had "no real chance of getting the bomb",⁹² and did not want their neighbours to have it. They would, in America's estimation, therefore support the treaty. This left those which lay between the 'haves' and the 'have-nots' who did not - or may not - want to close their options. The United States was looking for immediate support from these states, including Australia, in order to allow for the earliest possible entry into force of the treaty.⁹³

It now fell to the US Mission to answer the questions posed by both sides of the internal Australian policy debate, from which the Australian negotiating position derived. For both the Australian and United States Governments, time was running out.

⁹⁰ *Supra*. At Note 86, p. 7, paragraph 24.

⁹¹ *Ibid*. At pp. 5-9; paragraphs 7-36.

⁹² *Ibid*. At p. 6, paragraph 20. Comment by George Bunn, general counsel, ACDA.

⁹³ *Ibid*. South Africa, India, Pakistan, Brazil, Argentina and Sweden are all examples of states which can be placed in this category.

A Fulcrum, a Lever, and a Place to Stand: The Australian Archimedes

The question which is central to Australia's role in the evolution of the 1968 *Nuclear Non-Proliferation Treaty* can now be addressed directly. Precisely *how* did Australia exercise disproportionate influence over its Superpower ally on an issue which loomed so large for the United States, as well as for many other states with far greater involvement in nuclear technology, and in its application?

As the UN debate approached, the Australian Cabinet decided to set aside the question whether Australia should, or should not, sign the NPT - or indeed whether it should, or should not, vote for any particular resolution. By doing so, it avoided a commitment which would have precluded later flexibility on these questions.⁹⁴ Instead, it decided that Australia's position in the General Assembly debate would be to:

.... declare support in principle for an effective treaty, but ... also register in a general way that the present draft raises a number of considerations for Australia which she must take into account when considering her position.⁹⁵

In addition, the Australian delegation would not, either in debate in the Assembly, or in discussions with other delegations:

.... appear to be opposed to a treaty or to be playing a leading part in opposing sections of this Treaty, but at the same time, it would be careful not to allow any suggestion which would lead to the impression that Australia is prepared uncritically to accept the Treaty as it stands.⁹⁶

On this fundamental point, and in order to establish the structure of Australia's Archimedian "place to stand", it is necessary to summarise each component of the agreed position of the Australian bureaucracy, together (where appropriate) with the relevant questions for resolution, and their negotiated outcome in talks with the US Mission on 18 and 19 April 1968. The decision of the Australian Cabinet, ten days later, on instructions to be given to the Australian Delegation for use in the forthcoming UN General Assembly debate on the text of the NPT, would, of course, be the final arbiter of policy.

⁹⁴ *Infra.* At Note 100, p. 1.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

The instructions it laid down in Cabinet Decision No. 165, with the exception of minor last-minute changes agreed with the US delegation in New York, can be taken as the clearest expression of consolidated Australian Government policy on the treaty itself, and on the future use by Australia of nuclear weapons for independent defence.

The final response of the United States Government to Australia's expressed concerns and actions, as laid out, for example, in *Aides-Memoires* to the Australian Government⁹⁷, and in the testimony of the United States Atomic Energy Commission before the United States Senate Foreign Relations Committee,⁹⁸ can then be contrasted with its original position following negotiations with the Soviet Union at Geneva. Although some modification to Australia's consolidated position was, in fact, made in discussions between Australian and United States representatives in New York, prior to the United Nations General Assembly debate,⁹⁹ the substantive thrust of Australia's arguments remained that which it set out in the Canberra discussions with the US Mission.

This was confirmed by Cabinet Decision No. 165 of 29 April 1968, in which (as discussed above) the Cabinet, having received the report of the Defence Committee on the outcome of talks with the US Mission, directed the Australian Delegation on the line to be taken on all facets of concern during discussions with other Delegations, and in the debate itself.¹⁰⁰

Nevertheless, an opportunity existed, even at this late stage, for Prime Minister Gorton to modify Australia's position on the treaty during his talks with senior US Cabinet members in Washington from 24 to 30 May. However, there is no documentary record of any direct effect flowing from Gorton's visit (which occurred during the latter

⁹⁷ For example, Document A 1838/346: TS 919/10/5, Pt. 16 [66]. *Aide-Memoire of the United States Government* (13 May 1968). Canberra: Australian Archives.

⁹⁸ Document A 5882/2: CO32, Pt. 2 [64] (12 July 1968). *Testimony of Chairman Glenn Seaborg before the Senate Foreign Relations Committee on the Non-Proliferation Treaty*. Canberra: Australian Archives.

⁹⁹ For example, Australian representatives, having found little interest or concern among member states at the UN over the risk of espionage emanating from Safeguards Inspections, proposed not to raise the matter in the speech by UN Ambassador Shaw during the UN debate. Document A 1838/346: 719/10/6, Pt. 5 [140] (8 May 1968). *Inward Cable UN 762: Australian Mission to the United Nations to: DEA, Canberra*. At p. 3, paragraph 9. Canberra: Australian Archives.

¹⁰⁰ *Cabinet Decision No. 165* (29 April 1968). Available [on-line] WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_32.htm [52].

stages of the debate in the First Committee of the Twenty Second General Assembly) on Australia's national position.¹⁰¹

Taken in the order addressed by the Defence Committee's Report of 26 April,¹⁰² the components of the final incarnation of Australian concerns - in which Cabinet concurred in its Decision No. 165 - were as follows:

- Efficacy of the Treaty

Degree of Support

Australia needed assurance, before it would ratify the treaty, that the bulk of states capable of early development of nuclear weapons themselves intended to sign and ratify it. In Australia's region, these states included India, Pakistan, Japan and (importantly) Indonesia - which might conceivably acquire nuclear weapons from Communist China. Although this requirement did not preclude Australia's signature, the Cabinet agreed that ratification was unlikely in its absence, notwithstanding the anxiety expressed by the United States over the need for all nuclear "threshold" states to accede.¹⁰³

For their part, the US negotiators in Canberra had expressed confidence that most near-nuclear states would sign and ratify, including the majority of Western countries (with the exception of declared nuclear weapon state France). Japan was likely to support the NPT, although India was uncertain, while the most critical countries were Israel and the United Arab Republic. In summary, the US saw little difficulty in obtaining a sufficient number of relevant signatory states, although it admitted a concern for the possibility of states postponing signature unnecessarily.¹⁰⁴

¹⁰¹ Ramsey, A. (1968, May 23). *Gorton will meet all the top men on U.S. visit*. The Australian, p.1. Gorton's Briefing Notes in fact followed closely the positions taken by the Defence Committee in its Report of 26 April 1968 (See Note 72).

¹⁰² *Supra*. At Note 72.

¹⁰³ *Ibid*. At pp. 4, 5. *Supra*. At Note 100, p.2.

¹⁰⁴ Document A 1838/346: 719/10/6, Pt. 5 [158]. *Summary record: Meeting of officials of the United States and Australian Governments, Department of External Affairs, 18th-19th April, 1968*. Canberra: Australian Archives. At pp. 5-8.

Efficacy of Safeguards

Australia looked towards the establishment of a Safeguards system which offered coverage adequate to ensure reasonable surveillance in most present situations, rather than a guarantee of complete coverage of all possibilities for diversion of nuclear materials to weapons manufacture. However, it was specifically concerned with the possibility of diversion which was hidden behind the use of military nuclear propulsion, which appeared not to be subject to safeguards under the treaty.¹⁰⁵

The question for resolution, therefore, was the status of nuclear propulsion units in warships. This uncertainty highlighted inconsistencies between the NPT text, and the Statute and existing safeguards system of the International Atomic Energy Agency. While the Statute guarded against the use of nuclear material for *all* military purposes, the NPT text only prohibited their use in explosive devices.¹⁰⁶

The US Mission responded by pointing out that the IAEA had not yet determined whether warship nuclear propulsion constituted a military purpose. It believed the agency would not hold such use to be subject to safeguards inspection, but, in any event, the NPT text did not prohibit the use of nuclear propulsion in warships.¹⁰⁷

Independent Interpretation

Australia noted that the treaty contained no provision for its independent interpretation, such as a reliance on Advisory Opinions of the International Court of Justice, or a special arbitral tribunal. In these circumstances, the interpretations placed on it by its three sponsors, the United States, the United Kingdom and the Soviet Union, would hold the greatest significance.¹⁰⁸ (Parenthetically, Australia's ability to influence the substance of interpretations acceptable to the United States would therefore enhance its influence over the interpretation of the treaty among other important non-nuclear states).

¹⁰⁵ *Supra*. At Note 72, p. 5.

¹⁰⁶ Article III A (5), *Statute of the International Atomic Energy Agency* [A.T.S. 1957, No. 11]. At Appendix III. Articles I, II and III, 1968 *Nuclear Non-Proliferation Treaty*. [79 U.N.T.S. 161].

¹⁰⁷ *Supra*. At Note 104, p.22.

¹⁰⁸ *Supra*. At Note 72, p.6.

The US Mission acknowledged the lack of any machinery to resolve differing interpretations of the text. General Counsel Bunn offered the possibility of resolution through the IAEA, although, ultimately, interpretation would be up to the States Parties themselves - and eventually the UN Security Council.¹⁰⁹ Such a position did nothing to restrict the aspirations of the Australian Cabinet in its search for an acceptable treaty text.

- Impact on Australia's Commercial Interests

Australia expressed concern over the potential impact of the safeguards requirements of Article III on its expanding export markets for uranium and mineral sands. If Article III (2) of the NPT subjected all "source or special fissionable material" to safeguards inspection, states to whom Australia exported uranium and other safeguarded material would have to be excluded from Australia's export markets unless they became party to the treaty. Thus, Australia would be concerned to see that states such as Japan ratified the treaty, in order to continue to import Australian uranium.¹¹⁰ It was therefore important to have a definition of "source or special fissionable material", in order to be certain whether Australia's uranium exports would be subject to diversion safeguards, both in Australia and at their destination.

On this score, the US Mission believed the definition contained in the IAEA Statute was "generally acceptable".¹¹¹ General Counsel Bunn asked Australian representatives whether it would be satisfactory to Australia if this was resolved during the United States' ratification process before Congress, rather than in the UN debate, as

¹⁰⁹ *Supra*. At Note 104, p. 46.

¹¹⁰ *Supra*. At Note 72, p. 6.

¹¹¹ The Statute of the International Atomic Energy Agency defines "source material" as including natural uranium, uranium depleted in the isotope U 235, and thorium. It may be in the form of metal, alloy, chemical compound or concentrate, and may also comprise any other material containing one or more of the three materials in concentrations determined by the Board of Governors. The Board may include any other material within the definition of "source material", as it determines from time to time. Article XX (3). *Statute of the International Atomic Energy Agency*. [A.T.S. 1957, No. 11].

The Statute defines "special fissionable material" as plutonium-239, uranium-233, uranium enriched in the isotopes 235 or 233, any material containing these four materials, or any other material as the Board may determine. It does not include "source material". Article XX (1).

the US wished to avoid divisive debate of this sort on the floor of the General Assembly.¹¹²

As noted above, Cabinet had already agreed that the Australian Delegation to the United Nations would avoid open opposition to the treaty in the General Assembly debate. It remained to be seen to what degree acquiescence in this respect would be to Australia's advantage when the US Administration presented its interpretations of the treaty during the ratification process before Congress.

- Interpretation of "Manufacture" in Articles I and II

Australia sought to encourage and support the interpretation offered by the US Mission on the interpretation to be placed on the term "manufacture ... [of] nuclear weapons or other explosive nuclear devices" in Articles I and II. The interpretation of the term was, in the Defence Committee's view, "of paramount importance" to Australia for two main reasons: to maintain the maximum possible scope for the development of peaceful and non-explosive military uses of nuclear energy, *and for the development of nuclear weapons, should that become necessary*.¹¹³ It was therefore vital for Australia to know the point at which its nuclear activities would become prohibited by the terms of the treaty.

The US Mission had, when pressed on the point, stated that "manufacture" would not include any research, development, production or use for which there was a conceivable peaceful intent, *whether or not* such activities advanced a state's capacity to manufacture nuclear weapons. Furthermore, Articles I and II dealt only with what was prohibited, not what was permitted. Thus, the treaty prohibited explosives manufacture, but permitted all else (an interpretation which the US had agreed with the Soviet Union).¹¹⁴

¹¹² *Supra*. At Note 104, p. 25.

¹¹³ *Supra*. At Note 72, p. 7.

¹¹⁴ *Supra*. At Note 104, pp. 19, 20. The Australian negotiating team's understanding of the position taken by the US Mission was later challenged by the United States in its *Aide-Memoire* to the Australian Government of 6 May 1968, in which the US stated that the Mission had merely advised its interlocutors that it would seek guidance on the point from Washington. See Chapter Six. Document A 1838/346: TS 919/10/5, Pt. 10 [108]. *Outward Cablegram No. 386 from Department of External Affairs, Canberra to the Australian Mission to the United Nations, New York*. Canberra: Australian Archives.

However, the US Mission had qualified these strong interpretations by adding that there was a "grey area" surrounding preparations for the manufacture of nuclear weapons, which it was not prepared to define, but which it would be for the IAEA to establish over time through consideration of specific cases.¹¹⁵ The United States Government would establish its interpretation of the meaning of "manufacture" during ratification proceedings before the United States Congress, which would thus become binding for all US dealings under the treaty.

The Report of the Defence Committee, on which Cabinet Decision No. 165 was based, advised that, on the basis of these US interpretations Australia could, without breaching the NPT, reduce the lead time for nuclear weapons production to approximately three years.¹¹⁶ The Australian Cabinet (undoubtedly encouraged by the nuclear nationalists in its ranks) directed the UN Delegation to ensure that the US interpretation was clearly understood in the UN, and especially by the United Kingdom and the Soviet Union. The Delegation should attempt to ensure that the US interpretation was not opposed by any significant power in the General Assembly debate, and to consult closely with Canberra on any developments which threatened Australia's scope for work relevant to the manufacture of nuclear weapons. The "bomb lobby", though weakened, was still well and truly alive.

- Application of Safeguards Within Australia

Australia expressed its apprehension over a number of issues concerning the imposition of a safeguards inspection regime by the International Atomic Energy Agency within Australia.

Unequal Application

The treaty was unequal in its application, in view of the fact that the declared nuclear weapon states were not required to submit their own nuclear activities to IAEA safeguards inspections. This gave them advantages in respect of the commercial secrecy

¹¹⁵ *Supra*. At Note 113, p. 8.

¹¹⁶ *Cabinet Submission 69/1968: Non-Proliferation Treaty* (26 April 1968). Available [online] WWW:http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_1.htm [50]. At p. 8.

of their peaceful nuclear activities.¹¹⁷ Although not required to do so under the terms of Article III, the United States and the United Kingdom had agreed to place their peaceful use nuclear installations under IAEA inspection. Australia looked to the Soviet Union to do likewise, and for all declared nuclear weapon states to restrict their non-safeguarded activities to the greatest extent possible.

The Australian Delegation, although it would not be encouraged to do so by the United States, was instructed by Cabinet to urge the Soviet Union to consider this course of action.¹¹⁸

Industrial Espionage Risks

The danger of industrial espionage by IAEA inspectors was of significant concern. As a major producer and exporter of "source material" (uranium in the form of "yellowcake") Australia felt itself to be particularly vulnerable in this regard.¹¹⁹

The primary question for Australia was whether its mines and processing facilities (such as milling and ore concentration plants) would be subject to safeguards inspections under Article III. Did such installations qualify as "principal nuclear facilities", as described in sub-section (1)? Although the current safeguards system largely excluded mines and ore processing plants, it was not clear whether this freedom would remain, given that the NPT referred in Article III to "*all* source material" (emphasis added).¹²⁰

The US Mission had taken a sanguine view of the industrial espionage risk. Inspectors would be unlikely to be exposed to commercially sensitive information and, in any event, safeguards were directed towards materials, rather than the plants in which they were found. In this case, the question of the definition of "principal nuclear facility" was largely moot. In the Americans' view, it was not necessary or desirable to have safeguards on mines or unprocessed ore. The exported ore would not itself be

¹¹⁷ *Ibid.* At p. 10.

¹¹⁸ *Ibid.* Cabinet Decision No. 165: Submission No. 69 - Non-Proliferation Treaty (29 April 1968). Available[online] WWW:http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_32.htm.

¹¹⁹ *Ibid.*

¹²⁰ *Supra.* At Note 104, p. 26.

subject to safeguards, but the source or special fissionable material which was derived from it, after export, undoubtedly would be. The time for safeguards to begin was, in their view, the point at which concentrated material in a manageable form had been produced. It was at that point (the "yellowcake" or uranium oxide stage) that diversion had a practical meaning.¹²¹

In summary, it seemed unlikely that Australian uranium or other mines and processing plants would be subject to safeguards inspections, and thus to the risk of industrial espionage.

The Cabinet regarded this as a satisfactory outcome which required no further consideration, beyond the need to "assert and establish" (presumably at both the IAEA and the United Nations) the right to continue to reject any particular IAEA Inspector. Nevertheless, Cabinet held that the denial of a right of rejection might be sufficient to result in Australia's refusal to support the treaty. It noted that the question of rejection of IAEA inspectors also had relevance for questions of risks to national security, although this was still being assessed by the Director General of Security within the Australian Security Intelligence Organisation.¹²²

Other Commercial Effects of Safeguards

Australia was anxious, as was Canada, (also a major uranium miner) to achieve exclusion of ores, minerals, mines, and ore treatment and refining plants from safeguards inspection for reasons other than commercial secrecy.¹²³ Although the US Mission had, as noted above, discounted the need for inspection of mines and unprocessed ores, this negotiated position required protection from amendment at the United Nations. Cabinet believed that the costs and burdens involved in complying with inspections requirement were (as had been admitted by the US Mission) unjustified by their effectiveness, and should be avoided.¹²⁴

¹²¹ *Ibid.*

¹²² *Cabinet Decision No. 165* (26 April 1968). Available [on-line]: WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_33.htm [52] At pp. 2 -4.

¹²³ *Supra.* At Note 116, pp 12, 13.

¹²⁴ *Supra.* At Note 122, p. 3.

Additional Safeguarded Material

The uncertainty created by Article XX (3) of the Statute of the International Atomic Energy Agency was a cause for Australian Government concern. It states, *inter alia*, that:

The term "source material" means ... such other material as the Board of Governors shall from time to time determine".¹²⁵

Cabinet indicated that it would not necessarily accept any future extension of the definition of source or special fissionable material by the IAEA, and directed the UN Delegation to ascertain whether any early extension was under consideration.

Deposit of Excess Material with the IAEA

The Cabinet expressed a high level of concern over the apparent conflict between the requirements of Article XII (A) (5) of the IAEA Statute, and the position which the US Mission had stated during negotiations. The Statute required states to deposit with the agency any material surplus to its immediate requirements, in order to prevent stockpiling of those materials. Prompt return of deposited material (as needed for nuclear fuel replenishment) was, however, provided for in Article XII (A) (5).¹²⁶

This contrasted with the US assertion that Australia could stockpile any safeguarded enriched uranium to any desired extent. The Mission had noted that the Statute provision on deposit of material with the IAEA had never been used, and was unlikely to be used in the future. Nevertheless, the Cabinet stated in Decision No. 165 that the outcome of this conflict may have a decisive effect on Australia's eventual decision on signing the treaty. The UN Delegation should seek to confirm the US position with all three sponsor states and other "significant countries".¹²⁷

¹²⁵ *Supra.* at Note 111.

¹²⁶ *Supra.* At Note 116, pp. 15, 16.

¹²⁷ *Ibid. Supra.* At Note 122, p. 3.

Inspection Costs Allocation

The allocation of the costs associated with safeguards inspections was a subject of some concern to Australia, in view of its possible future mining and other nuclear activities. It was necessary to avoid adoption of the Soviet Union's position that the costs of safeguards inspections should be borne solely by those states to which the safeguards were applied.

The US view was that the current arrangement should remain. Safeguards costs should be shared amongst members states of the IAEA according to their assessed budget contributions (which, in Australia's case, was 1.4% of the total budget). That view was to be supported by the Australian Delegation in the UN debate.¹²⁸

Future Amendments to the IAEA Statute and/or Safeguards System

Several issues bore upon the possibility of future amendments to both the IAEA Statute and the modified safeguards system to be applied by the Agency to the requirements of the NPT. They were sufficiently serious, in the Australian Government's view, to be capable of "entering critically" into Australia's final decision on signature.¹²⁹

First, Australia concurred with the US in that any suggestion for re-negotiation of the Statute, in order to accommodate the requirements of the NPT, should be resisted in the UN debate.¹³⁰ It nevertheless acknowledged that the Statute could be amended by a two-thirds majority vote of member states in the IAEA General Conference. Further, the US Mission had confirmed that any future amendments to the IAEA Statute and/or safeguards system would be mandatory for States Parties to the treaty. Cabinet specifically resisted such a proposition. Any changes were likely to impact on Australia's interests, and should only occur through bilateral agreement between individual states and the Board of Governors of the IAEA.

Since this was likely to result in variations in the obligations which states undertook in safeguards agreements, it was desirable, for the sake of uniformity, to have

¹²⁸ *Supra.* At Note 116, p. 16. At Note 122, p. 3.

¹²⁹ *Supra.* At Note 122, p. 3.

¹³⁰ *Ibid.*

a Model Safeguard Agreement drawn up, and approved, by the IAEA before individual safeguards agreements were negotiated.¹³¹

- Peaceful Nuclear Explosions

Australia noted the assurance given by the US Mission that the sponsors of the NPT intended that the "appropriate international procedures" mentioned in Article V of the NPT would prevent the withholding, by the United States or any other state, of a peaceful use nuclear explosives service simply for political or economic reasons. Since the US intended to have exclusive control over the service, such an interpretation was to be endorsed and encouraged by the Australian Delegation through discussion with other delegations, and in the UN debate.¹³²

- Withdrawal from the Treaty

Article XI (1) expressed the right of a State Party, in exercising its national sovereignty, to withdraw from the treaty:

.... if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardised the supreme interests of its country.

Although the US Mission had indicated that this left the right to withdraw open to interpretation by each party, it also believed that the intention of the term was to severely limit the legitimate circumstances of withdrawal. For example, it was not contemplated by the United States that withdrawal would be allowed in the face of a purely conventional military threat.¹³³

Australia expected that criticism of the Article would come from states which were anxious about their security in the face of a superior threat, and were unsupported by a major nuclear power. This was unlikely to occur in Australia's case, since its mutual defence alliance with the United States was likely to remain strong.

¹³¹ *Supra*. At Note 116, pp. 18 - 20.

¹³² *Supra*. At Note 122, p. 4.

¹³³ Document A 1838/346: 719/10/6, Pt. 5. [158]. *Meeting of officials of the United States and Australian governments, Department of External Affairs, Canberra, 18th - 19th April 1968*. Canberra: Australian Archives. At p. 43.

Consequently, Australia would not raise any questions concerning interpretation of the right to withdraw, but did not want to see any tightening of the present text, or agreed interpretation at the UN debate.¹³⁴

- Proposed Security Council Resolutions

Cabinet noted the proposed tripartite security assurances announced by the United States, the United Kingdom and the Soviet Union on 7 March 1968. Given in order to establish a promise of additional security for those non-nuclear states which viewed the NPT text as insufficiently strong, they would take the form of a Security Council Resolution, and would declare that any nuclear aggression would be "countered effectively" by the permanent members of the Security Council (the nuclear weapon states).¹³⁵

Since the threat or use of nuclear weapons against a non-nuclear weapon state would create a "qualitatively new situation", the nuclear-armed permanent members of the Security Council would be bound to take necessary counter-measures in accordance with Chapter VII, Article 42, of the Charter.¹³⁶ By re-affirming the right of collective self-defence established by Article 51 of the Charter, the United States was asserting a discretionary right to go to the aid of a member of the United Nations without hindrance from the veto power of the other permanent members of the Security Council.

In Cabinet's view, such assurances constituted a guarantee of security no greater than that already afforded by Australia's adherence to the ANZUS Treaty with the United States and New Zealand, which constituted the real protection it enjoyed in its security relationship with the United States.¹³⁷

¹³⁴ *Supra*. At Note 122, p. 4.

¹³⁵ United States Arms Control and Disarmament Agency. (1969). *International negotiations on the treaty on the Nonproliferation of Nuclear Weapons*. Washington DC: US Government Printing Office. At pp. 112-113.

¹³⁶ *Ibid*. At p. 113. See Appendix I.

¹³⁷ *Supra*. At Note 116, p. 23.

- Duration of the Treaty

The optimum duration of the treaty received a thorough analysis in the Defence Committee submission which supported Cabinet Decision No. 165.¹³⁸ It appeared, from the attitude of the US Mission, that any period shorter than 25 years was unlikely to be acceptable to the United States, or to the Soviet Union. Provided, however, that the ANZUS Treaty continued to have the meaning Australia attached to it, and that Indonesia acceded to the NPT, the Committee foresaw no concern over the proposed 25 year term.¹³⁹

On this basis, Cabinet decided not to direct the UN Delegation to raise the issue in the First Committee debate. The United States appeared to be very concerned that any discussion on duration could develop into a "rallying point" for those states opposing, or seeking to defer, a decision on the treaty. In view of the anticipated strength of US reaction to Australian activism on the point, Cabinet deemed it prudent for Australia to remain silent. If the duration of the treaty became a serious issue in the General Assembly, a revision of the Australian position may then become necessary.¹⁴⁰

Conclusion

Here, then, was the nuclear policy position of the Australian Government on the eve of the debate in the United Nations General Assembly on the endorsement of the text of the new *Nuclear Non-Proliferation Treaty*. It is clear from Cabinet Decision No. 165 that, while the goals of the treaty had received substantial support around the Cabinet table, nuclear nationalist sentiments were still alive.

For example, Cabinet's express determination to have the US Mission's definition of the meaning of the term "manufacture ... of nuclear weapons" endorsed by all three sponsoring states (thus allowing a lead time for the production of a nuclear weapon of around three years) is difficult to reconcile with any international legal commitment to renounce their possession.

¹³⁸ *Ibid.* At pp. 24-27.

¹³⁹ *Ibid.* At p. 26.

¹⁴⁰ *Ibid.*

Furthermore, it was at this point that Lennox Hewitt replaced Sir John Bunting as Permanent Secretary of the Department of the Prime Minister. Hewitt immediately began to lobby Prime Minister Gorton on the need for a cautious approach to the value to be ascribed to the proposed tripartite security assurances announced on 7 March.¹⁴¹ Being, in addition, sceptical of the chances of the United States extending nuclear security to Australia under the ANZUS Treaty, he exhorted Gorton to press US President Johnson on the point in his forthcoming talks in Washington.

The strength of Hewitt's late contribution to the cause of the nuclear nationalists in Cabinet, of which Gorton was one, is clear from his words to the Prime Minister:

In all this, I am not overlooking the benefits which we should obtain by the agreement of other countries not to indulge in the building of nuclear weaponry. Nevertheless, as signatories, they may cheat. And China will not be a signatory. Will the Americans come to our aid, under ANZUS, with nuclear weapons in the event of a threat to Australia by Chinese nuclear weaponry? This year; next year; in twenty-four years from now? Will they ???¹⁴²

It remained to be seen whether the United States Government, urged on by a President searching for a success on the world stage, and by an urgent desire to restrict the widening distribution of nuclear weapons, would be prepared to bow to pressures exerted by its Pacific ally - in the cause of Western consensus. It would thereby have to deal with fundamental Australian concerns on a number of fronts, and in doing so would have to re-assess, clarify and re-interpret the terms of the NPT text for which Australia - driven by its own policy ambivalence - held misgivings.

The stage on which the final act would be played out was shifting to the United Nations General Assembly in New York; to discussions there between delegations involved in the debate on the treaty text, and to continuing negotiations between Australia's diplomats in Washington and their interlocutors at the United States Arms Control and Disarmament Agency. As discussed above, Australia was prepared to play a tough political game in order to gain ground on the interpretation of this most important of multilateral arms control treaties. It also knew, as indicated by its approach

¹⁴¹ Minute from Secretary of the Department of the Prime Minister Hewitt to Prime Minister Gorton: The nuclear treaty (28 April 1968). Available [on-line] WWW: http://www.naa.gov.au?COLLECT/cabpaper/Cabinet68/images/A15619C48_1.htm [51].

¹⁴² *Ibid.* At p. 4.

on the question of treaty duration, that there were limits to recalcitrance beyond which it would be dangerous to step.

These considerations formed the context in which Australia approached the debate in the United Nations on a resolution to open the NPT for signature as a United Nations Treaty. It remains to examine both the international legal implications of Australia's nuclear policy, and the rewards of its labours.

CHAPTER FIVE

MAKING A DIFFERENCE: A MIDDLE POWER IN ACTION

Introduction

On the 18 February 1970, Prime Minister John Gorton stated in a Press Release that the Australian Cabinet had:

.... decided ... that it would be in Australia's interests to sign [the Nuclear Non-Proliferation Treaty] - but with reservations. Signature will enable us to join with other like-minded signatories, such as West Germany and Japan to achieve those interpretations, assurances, and qualifications which we regard as necessary.¹

As Gorton was aware, Australia was then in receipt of a wide range of comprehensive, and politically and legally binding assurances and interpretations of the treaty's terms from the United States (and, to a lesser extent, the United Kingdom). His own nuclear nationalism, and Australia's reluctance to embrace the NPT during the early months of 1968, had ensured that outcome. Even so, he and his Cabinet felt compelled to make clear, in this disingenuous way, its decision that Australia's signature in no way indicated an intention to ratify the treaty. Ratification would occur only after Australia's stated Reservations, made upon signing the treaty, had been satisfied.

The most important of those Reservations (many of which were canvassed in Cabinet Decision No. 165) was one concerning the effect of the NPT on "nuclear development", which should not be prohibited if it had a purpose *other than* the manufacture of nuclear weapons.² Thus, Australia continued to prevaricate on its support for the principle of combating the spread of nuclear weapons.

It was readily apparent that, although the long battle of the Australian nuclear nationalists was drawing to a close, they still commanded sufficient strength at the Cabinet table to insist on a decision which - even as the NPT entered into force - was a

¹ Document A 1838/346: TS 919/10/5 [129]. (18 February 1970). *Press Release PM No. 30: Statement by the Prime Minister, Mr. John Gorton: Signing of Nuclear Non-Proliferation Treaty*. Canberra: Australian Archives.

² Document A 1838/346: TS 919/10/5 [130]. (27 February 1970). *Department of External Affairs News Release No. M/15: Signature of Non-proliferation Treaty: Statement by the Government of Australia on the Occasion of the Signing of the Nuclear Non-proliferation Treaty*. Canberra: Australian Archives.

manifest compromise between themselves and their opponents.³ Nevertheless, the consolidation of Australia's nuclear policies had already done its work in focusing its American ally on questions concerning the treaty's interpretation and operation which it would have preferred to leave to later times and calmer councils.

As the First Committee of the United Nations General Assembly prepared to debate what was, arguably, the most important international treaty text to come before it, discussions on its merits continued in New York between diplomats of the Australian Delegation, and those of the United States and the United Kingdom. In this way, Australia was able to maintain a close review of the evolving attitudes and positions of its Western allies - and through them other states - in the shadow of the UN debate. By doing so, the Australian Government was well placed to react swiftly to any developments which promised to be to Australia's advantage.⁴

Under the direction of the Australian Ambassador to the United Nations, Patrick Shaw, and with the guidance of the Australian Cabinet, this process revealed issues in the overall NPT debate on which Australia was, in fact, willing to support the United States and Britain. One clear example was the question of exemption of uranium mining operations from safeguards inspection - an outcome sought by both Australia and the United States. By also agreeing to lend overall support to the United States in the United Nations debate on "an effective treaty", and to vote in favour of a resolution in the General Assembly endorsing its text,⁵ Australia was able to leaven its previous

³ The 1968 *Nuclear Non-proliferation Treaty* entered into force on 5 March 1970, by when 97 states had signed the treaty, and 47 had ratified it. Article IX (3) provides for the treaty's entry into force following its ratification by the three Depositary States (the United States, the United Kingdom and the Soviet Union) and forty other signatory states [79 *UNTS* 161]. Erlich, T. (1970). The Nonproliferation Treaty and peaceful uses of nuclear explosives. *Virginia Law Review* 56, (4), pp. 587-601. At P. 589.

⁴ The Minister for External Affairs, Paul Hasluck, had undertaken, as part of Cabinet Decision No. 165, to provide Cabinet members with summary reports of progress in the General Assembly debate, as well as on the outcome of discussions held by the Australian Delegation to the UN with other member states on NPT issues. A Working Group of the augmented Defence Committee was instructed to keep communications from the Delegation under constant study, and to submit for consideration by Cabinet any matters requiring its attention. *Cabinet Minute: Decision No. 165*, 29 April 1968 [52]. [on-line]: Available WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_32.htm .At p. 5.

⁵ Draft Treaty on the Non-Proliferation of Nuclear Weapons: Statement by the Australian Ambassador to the United Nations, Mr. Patrick Shaw, in the First Committee of the United Nations General Assembly on 17 May 1968. (1968). *Current Notes on International Affairs*, 39 (5), pp. 206-210. At p. 210.

resistance with a degree of co-operation sufficient to convince the United States that its accommodations over the terms of the NPT would eventually prove worthwhile.

This chapter will review the course of Australia's actions within the context of the General Assembly debate, and examine the final form of American compromises, clarifications and amended interpretations of the terms of the treaty which were proffered and made during negotiations with Australia in New York.

The extent of Australia's influence over the course of the treaty's endorsement by member states of the United Nations was largely commensurate with its ability to affect the stated positions of the United States. As the driving force behind multilateral anti-proliferation efforts, the American superpower had gained approval for the terms of the treaty from all but one of its allies, notwithstanding the early concerns of some. Amendments to its terms which did not alter its operational effect in fundamental ways were, therefore, likely to find general agreement or acquiescence - at least from US allies - during the UN endorsement process.

In this way, the pronouncements of senior representatives of the US Mission to the United Nations in New York, and of the US Arms Control and Disarmament Agency, together with assurances contained in US Government *Aides-Memoires* to the Australian Government are each central to a definitive appraisal of the nature and extent of Australian influence. Nevertheless, each of these indicators of United States Government policy on the terms of the NPT is subordinate to its *public* statements in the General Assembly First Committee debate,⁶ and before Congress during the United States ratification process.⁷

The interventions of US Ambassador Arthur Goldberg in the UN debate were delivered in the General Assembly on 26 April and 15 May, followed by a closing statement on 31 May. The testimony of United States Atomic Energy Commission Chairman Glenn Seaborg was given before ratification hearings of the United States Senate Foreign Relations Committee on 12 July 1968 (less than two weeks after the treaty's opening for signature). Together with the report of Secretary of State Rusk,

⁶ Document A 1838/346: 719/10/6, Pt. 5 [155]. (15 May 1968). *Cablegram UN 813 from Australian Mission to the United Nations, New York, to Department of Foreign Affairs, Canberra. Statement of US Ambassador to the United Nations Goldberg in the First Committee of the General Assembly*, 15 May 1968. Canberra: Australian Archives.

⁷ Document A 5882/2: CO32, Pt. 2 [64]. (12 July 1968). *Testimony of Chairman Glenn Seaborg before the Senate Foreign Relations Committee on the Non-Proliferation Treaty*. Canberra: Australian Archives.

submitted by President Johnson to the Senate in support of ratification, they constituted the final form of US Government views on the NPT at its inception. As such, they were the acid test both of US interpretations, intentions and expectations, and the success of Australia's nuclear policy transformation.

Australia at the United Nations: Policy on the Run.

The process of diplomatic exchange between Australia and the United States over the terms of the treaty had been continuous since the latter months of 1966. On 20 December 1966, for example, the Australian Embassy in Washington had reported a "run-down" provided to it by the head of the Political Affairs Division of the US Arms Control and Disarmament Agency (ACDA) on informal discussions between the US and the Soviet Union concerning a non-proliferation agreement.⁸

Those discussions, between the chief negotiators of the two superpowers in earlier formal non-proliferation negotiations (held from June to August 1966 at the Tenth Session of the Eighteen Nation Disarmament Committee in Geneva)⁹ were the first bilateral talks to be reported to Australian diplomatic representatives, although non-proliferation discussions at the ENDC had then been in progress in Geneva for over a year.¹⁰

This intelligence marked the beginning of the pattern of diplomatic consultation on NPT negotiations between America and Australia, noted in Chapter Three, which continued uninterrupted until the treaty's opening for signature on 1 July 1968. As a

⁸ Document A 1838/275: 719/10/6, Pt. 1 [73]. (20 December 1966). *Cablegram No. 5118 from Australian Embassy, Washington to Department of External Affairs*. Canberra: Australian Archives. The Embassy's interlocutor, Kranich, provided information on a "non-attributable" basis, and this and later communications from Australia's Washington Embassy and UN Mission in New York usually requested that the source of the relayed information be "protected".

⁹ The US representative was the Director of ACDA (Ambassador Foster), while his Soviet counterpart at the negotiations was Ambassador Roschin. *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At p. 63.

¹⁰ The first Draft of a nuclear non-proliferation treaty had been presented to the Eighth Session of the ENDC at Geneva on 17 August 1965 by the United States following consultations with Canada, Italy and the United Kingdom. It received a mixed reception from the Committee, and was countered by the submission of an alternative Draft text by the Soviet Union at the Twentieth General Assembly on 24 September 1965. *Ibid.* At pp. 17-22.

result of the importance which the United States attached to Australia's support, bilateral discussions intensified at the diplomatic level in the period leading up to the debate on the Draft NPT in the First Committee of the General Assembly.

The Twenty Second General Assembly re-convened on 24 April 1968 in Special Session, and its First Committee immediately began to debate the Draft NPT text, jointly tabled on 11 March 1968 by the United States and the Soviet Union at the ENDC.¹¹ Australia would now have its chance, at some point during the debate, to present its final position on the NPT to the member states of the United Nations. It was therefore essential that Australia do everything it could, as soon as possible, to confirm and reinforce the understandings and interpretations it had obtained less than a week earlier in negotiations with the United States Mission in Canberra.¹²

With that in mind, a wide-ranging discussion was held on 2 May between Australian representatives in New York, led by Ambassador Shaw, and senior representatives from the United States Arms Control and Disarmament Agency.¹³ The talks began with the question which the nuclear nationalists in the Australian Cabinet were most anxious to clarify: the definition of "manufacture" in respect of nuclear explosive devices. How far, precisely, could a signatory state go in preparations useful to the production of nuclear devices, and still remain in compliance with its NPT commitments?

In view of the central importance of this question to Australia's final policy position on accession, it is useful here to reproduce the text of Articles I and II of the NPT in full:

Article I

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

¹¹ *Supra.* At Note 9, p. 115.

¹² See Chapter Four.

¹³ Document A 1838/346: TS 719/10/5, Pt. 10 [109]. *Cablegram No. UN 744 from the Australian Mission to the United Nations, New York, to the Department of External Affairs, Canberra.* (7 May 1968). Canberra: Australian Archives. The United States representatives were led by ACDA Deputy Director Fisher and Assistant Director, Bureau of International Relations, ACDA (De Palma).

Article II

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

For the US side, ACDA Deputy Director Fisher acknowledged that the definition discussed earlier in Canberra had been proposed by Australia, although it had not necessarily been accepted by the United States. The Australian proposition had been that the word "manufacture", as used in Draft Articles I and II, should be taken to exclude any research, development, production or use for which there was a conceivable peaceful intent, *whether or not* such activities advanced a state's capacity to manufacture nuclear weapons.¹⁴

America's reservations on this score related to research and development activities involving significant quantities of fissile material. Although the United States had no objection to research work on, and production of, enriched fissionable material (such as uranium enriched in its fissile isotope U-235) Australia would not be permitted to divert this material to the production of weapons or other explosive devices. Nor would it be permitted to perform research and development work, using significant quantities of fissile material, on technological innovations which were directly related to nuclear explosives. In any event, both activities would be subject to the safeguards provisions of Article III of the Draft Treaty.¹⁵

Finally, since the treaty dealt only with what was prohibited, Articles I and II did *not* prevent the exchange of any information between States Parties which was not directly concerned with the manufacture of nuclear explosives. On the whole, though, Fisher believed that the United States would not find particular difficulty with the Australian definition. The US had not yet worked out the terms of an interpretative statement on "manufacture" which addressed Australia's concerns, but felt that one was

¹⁴ See Chapter Four, Note 114. The proposed definition was suggested by Malcolm Booker, First Assistant Secretary, Division II, Department of External Affairs. It appeared to be an attempt to provoke the United States into a definitive statement on the meaning of "manufacture". As a reaction against an putative self-serving Australian attempt to circumvent the spirit of the NPT, Booker hoped to obtain a strong US interpretation *against* the interests of the nuclear nationalists in the Australian "bomb lobby".

¹⁵ *Supra*. At Note 13, p. 3.

possible "in the last analysis". He "fully recognised" that Australia had an interest in "not having people looking too closely over [its] shoulder".¹⁶

However, the United States Government held grave concerns about the possibility of Australia raising issues surrounding the term "manufacture" in the UN debate, and urged the Australian Delegation against it. The risk was that an attempt to spell out the detail of a definition may result in greater support for more prohibitions than Australia may consider desirable - a result, it noted, in opposition to what Australia seemed to be seeking. In addition, such a debate could have "unfortunate consequences" in relation to Arab concerns over Israel's nuclear intentions, and some African states' concerns about South Africa. To approach the question in the General Assembly debate could feed suspicions in these quarters that might never be put to rest.¹⁷

The Australian Delegation, in line with the instructions laid down for it in Cabinet Decision No. 165, assured the US representatives that it had no intention of making an early statement on "manufacture". This did *not*, they added, preclude a public statement on the matter by a major nuclear power such as the United States, which might be an important factor in Australia's decision to ratify the treaty.¹⁸

Fisher undertook, at that stage, to return to the matter after taking instructions from Washington, and pointed out that he expected to be involved in the forthcoming United States Senate hearings concerning American ratification. He added that if the Soviet Union attempted to expand the prohibitions contained in Articles I and II, "the United States [will] defend [you]".¹⁹

This was substantial progress towards Australia's goal of obtaining a precise definition of the extent of flexibility in one of the most important terms of the Draft Treaty. However, this progress had more than one dimension. First, from the perspective of the NPT advocates at the Department of External Affairs - which enjoyed senior representation in the UN Delegation in New York - the United States

¹⁶ *Ibid.* Both phrases used by Fisher were understood by the Australian Mission in New York as a reference to a concession by the United States which amounted to an implied degree of flexibility on the meaning of "manufacture" in Articles I and II which, while inchoate, exceeded a strict interpretation of its terms.

¹⁷ *Ibid.*

¹⁸ *Ibid.* At p. 4.

¹⁹ *Ibid.*

had made a strong and authoritative statement that substantial diversion of fissile materials by Australia to non-peaceful purposes would not be tolerated under the treaty. Australia's suggested definition of "manufacture" - in essence, that the possibility of weapons applications should be ignored when an activity also had *any* peaceful relevance - had been modified to allow only research and development activities *with weapons applications* which did not involve "significant" quantities of fissile material.²⁰ That outcome was a substantial setback for the nuclear warriors of the Australian Atomic Energy Commission, as well as for the nuclear nationalists in Cabinet (including Prime Minister Gorton and Minister for National Development Fairbairn) and within the federal bureaucracy (notably, Cabinet Secretary Hewitt).

On the other hand, the United States had acknowledged Australia's desire not to have the definition of "manufacture" too closely defined, nor to endure too close a scrutiny of its nuclear activities. It appeared, to some extent, that the United States was prepared to allow tacit understandings to replace clear, explicit interpretations in the cause of securing Australia's support for the treaty - a *prima facie* benefit for nuclear nationalists advocating an independent Australian nuclear deterrent.

In a more general sense, each side of the Australian nuclear debate could take some comfort from US commentary on the meaning of "manufacture" in relation to nuclear weapons. While there appeared to be some room for manoeuvre with the United States on the precision of a definition of "manufacture", activities which could clearly result in the production of nuclear weapons would not be allowed.

Finally, while the matter remained to be concluded, Australia now had direct evidence of its ability to exert meaningful influence over its American ally - a valuable asset not to be squandered.

On the question of Australia's concerns over the terms of the Safeguards Agreement it would be required to sign with the IAEA, the US side acknowledged that Australia would have difficulty in ratifying the treaty without knowing, in advance, the obligations it would be undertaking in regard to safeguards inspections. Other states were likely to have similar concerns, and delays in ratification for this reason were both understandable and inevitable.²¹ The primary concern of the United States can therefore

²⁰ *Supra*. At Note 15.

²¹ *Ibid*. At p. 6.

be construed as Australia's signature on the treaty. Australia's support for its text in the General Assembly would be little more than window-dressing without an act of commitment to the principles of non-proliferation which the NPT sought to establish in international law.

While this placed a general imperative on Australia to support the Draft Text as submitted to the General Assembly (and subsequently to sign and ratify the treaty), the United States side moved on to review its interpretation of the application of safeguards inspections to mining operations and unprocessed ores - a matter which, as previously noted, had been of grave concern to the Australian Atomic Energy Commission.

On this score, the US representatives in New York were able to destroy one of the pillars of the AAEC's arguments against signing the new treaty. They pointed out that, since mineral ores were explicitly excluded from the definition of "source material" in Article XX (3) of the Statute of the International Atomic Energy Agency, they were currently excluded from safeguards inspections.²² Under the system then in place, safeguards came into effect only at the nuclear fuel fabrication stage, and there was no intention to extend that application back to the mining, milling or initial processing of uranium ores.²³

More importantly for Australia's non-proliferation advocates at DEA, the United States had raised the point with the Inspector-General of the IAEA. Inspector-General McKnight had agreed with the United States that, for the purposes of his organisation, "source material" began at the ore concentrate (in Australia's case the "yellow-cake") stage, which excluded the initial mining and milling of uranium ores.²⁴ With that understanding in mind, the Americans pointed out that Australia was not alone in its desire to exclude uranium mining operations from safeguards inspections.

²² *Ibid.* The US representatives, now in the absence of ACDA Deputy Director Fisher, were not entirely correct in their assertion, since Article XX (3) makes no specific exclusions of material to be defined as "source material". It is concerned only with the nature of material to be *included* as "source material". In fact, sub-section 3 of Article XX refers, *inter alia*, to "... uranium containing the mixture of isotopes occurring in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or *concentrate* " (emphasis added). Thus, it appears that the inclusion of unprocessed uranium ore in safeguards inspections is dependent on the definition to be ascribed to the word "concentrate". *Statute of the International Atomic Energy Agency. Australian Treaty Series* (1957) No. 11. At Appendix III.

²³ *Ibid.* C.f. McKnight, A. (1971). *Atomic safeguards: A study in international verification*. New York: UNITAR. At pp. 41, 72.

²⁴ *Ibid.*

Canada and South Africa had both expressed similar reservations, while the United States itself had an interest even larger than Australia's own in that regard. It should therefore be understood, they continued, that the United States supported the view that the mining, milling and export of uranium ores would *not* be subject to IAEA safeguards inspections.

Nevertheless, once again, the United States urged the Australian Delegation not to raise complex matters of this kind in the First Committee debate, on the ground that insistence on reservations and exclusions would only give rise, again, to suspicion about US and Australian motives among representatives of states which were less familiar with IAEA matters.²⁵

The final topic of immediate concern to Australia was the question of amendments to the IAEA Statute and safeguards system. As noted in Chapter Four, the Australian Cabinet viewed a failure to resolve such concerns, specifically in regard to the mandatory imposition of changes to Australia's safeguards obligations, as being capable of precluding Australia's signature on the NPT.²⁶ Here the Assistant Director, Bureau of International Relations, ACDA (De Palma) insisted that this was a matter to be "hammered out" in the IAEA (in which he noted Australia's influential position) rather than during the UN debate. Again, Australia was not alone in its concern to see its interests protected in respect of future amendments.²⁷

In the context of an initial, though high-level, negotiating process, Australia's diplomatic representatives could be satisfied with the views advanced by well-informed senior United States representatives who had been directly involved with the negotiation of the terms of the NPT with US allies around the world, and in the Eighteen Nation Disarmament Committee in Geneva. The tenor of the American approach was conciliatory and accommodating, while remaining firm on those

²⁵ *Ibid.* At p. 7. It is possible to view the US position on Australia's possible discussion of complex matters in the First Committee debate as being generated either by a genuine desire not to jeopardise the treaty's chances of successful conclusion, or by a more focused effort to placate what appeared to be Australia's list of grievances over its terms. In view of the ready initial acceptance of the treaty, the professed US anxieties over its supposed fragility at the UN may, in hindsight, have been largely for Australia's benefit. Nevertheless, until the treaty's success was assured after its opening for signature on 1 July 1968, US concerns over its premature demise must have been, at least partly, pragmatic.

²⁶ See Chapter Four, Note 129-131.

²⁷ *Supra.* At Note.25.

Australian concerns - such as its suggested definition of "manufacture ... of nuclear weapons" - on which too flexible an interpretation could threaten the integrity and purpose of the entire treaty.

Any interpretations of such a seminal component of the treaty text, which was agreed between Australia and the United States, would eventually enter the international public domain, either in US Senate ratification hearings, in the work of the International Atomic Energy Agency, or in bilateral diplomacy. America's ability to accommodate Australia's concerns in order to secure its signature was, *ipso facto*, restricted by the probable reaction of its other allies, as well as those of the many non-aligned and uncommitted states. Nevertheless, as far as Australia's United Nations representatives were concerned, these negotiations had struck a note of constructive engagement with the United States in which tough-minded resistance had been successfully combined with measured co-operation.

While the Australian Cabinet awaited the results of its latest diplomatic encounter with the United States, the UN Delegation continued to seek out support for the position of the Australian Government with other non-nuclear weapons state delegations at New York, though with limited success. Having been instructed by Cabinet not to indicate either outright acceptance, or rejection, of any or all of the Draft Treaty text,²⁸ it was, nevertheless, able to test the strength of international opinion on the range of Australia's objections during the early stages of the debate.

The Australian Delegation had noted very little attention, in the early stages of the formal General Assembly debate, on the text of the treaty itself. Instead, states had placed emphasis on broader disarmament and security issues. Apart from South Africa and the Federal Republic of Germany, delegations approached by the Australians had taken the view (previously emphasised by the United States) that the UN debate was no place in which to raise the sort of questions which disturbed the Australian Government.²⁹

²⁸ *Op. cit.* At Note 4, p. 1. Such a negotiating strategy was the *leitmotif* for the continuing element of ambivalence within the Australian nuclear policy development process.

²⁹ Document A 1838/346: 729/10/6, Pt. 5 [140]. *Cablegram UN. 762 from the Australian Mission to the United Nations, New York, to the Department of External Affairs, Canberra.* (8 May 1968). Canberra: Australian Archives. Classified Top Secret. Immediate.

On 8 May Ambassador Shaw reported to DEA a summary of his Delegation's informal discussions with other states' representatives at New York, and presented a mixed picture. While the West Germans were "keen advocates of our speaking about the treaty in great detail", they would not be doing so themselves.³⁰ Again, the United Kingdom had endorsed the American view that it would be "counter-productive" to canvass questions such as the interpretation of "manufacture" in open debate.³¹ Ambassador Shaw's suggested alternative was for Australia to secure written bilateral assurances on the issue from the United States, and perhaps to establish an "understanding" of its meaning in the Australian Parliament.³² Nevertheless, he was confident, from discussions with other delegations, that strong support for an interpretation of "manufacture" satisfactory to Australia would eventually be forthcoming.

On many other Australian concerns, over which the Cabinet (using the final Defence Committee Report of 26 April) sought multilateral support, little evidence of supportive trends was apparent. In fact, as Shaw noted, it was possible that over-emphasis by Australia on points which many states saw as non-controversial would invite suspicion over Australia's real intentions.

For example, the Defence Committee Report had argued that Article XII A 5 of the IAEA Statute sought to prevent stockpiling of fissile material, while the United States had asserted that the NPT text allowed such stockpiling under safeguards. The Statute provision had never been implemented, and an attempt by Australia to have it removed could invite curiosity from states as to its motives in doing so.³³

³⁰ *Ibid.* At p.1.

³¹ *Ibid.*

³² *Ibid.* At p. 2. It appears that Ambassador Shaw's suggested solution to the *impasse* with the US over Australia's senior UN representative discussing points of contention in open UN General Assembly debate merely reflected his own opinion. He appears not to have considered the possible ramifications in international law for Australia should it, at some future time, act in accordance with a confidential bilateral agreement with the United States on the interpretation of the term "manufacture". Australia could be placed in a position in which such an action could, at the same time, leave it in breach of an obligation more generally accepted in terms of international law. One example would be the acquisition of all components necessary for the assembly of a nuclear weapon, without taking the final step of bringing them together to create a functioning weapon. The question for resolution by the international community (in, for example, the Security Council or the International Court of Justice) would then be whether that action constituted a breach of Article II of the NPT.

³³ *Ibid.* At p. 5. At Appendix III.

Did Australia wish, for example, to remove all possible impediments to its future abrogation of the treaty, to be followed by a rapid move into nuclear weapons production?³⁴ The risk of assumptions of this kind from some states would accompany this and other attempts to have the NPT text too finely interpreted in the General Assembly debate.

In general terms, it seemed plausible to Ambassador Shaw that attempts by Australia to garner support for its views, even during informal discussions with other non-nuclear states at New York, was a dangerous strategy which was capable of having the opposite effect. As he pointed out, it may have been more productive to confine discussions on areas of concern to its American and British allies.

Taking 'Yes' for an Answer (and Getting it in Writing)

The most important component of Australia's diplomatic dialogue with the United States Government over the period of the NPT's evolution had been a series of *Aides-Memoires* presented by the United States to the Australian Government. As formal diplomatic communications between sovereign governments they comprised Australia's primary documentary source of authoritative intelligence on the positions held by the American Government (disregarding the products of national intelligence gathering).

More specifically, their value lay in their role as the diplomatic means by which the United States sought to make its views and intentions known to the Australia Government, or formally to clarify the results of negotiations in order to dispel misunderstandings. As part of its developing dialogue with Australia over the emerging NPT Draft Text, the United States had emphasised their importance from an early stage. The weight which it also attached to keeping Australia formally apprised of its negotiating position was evident as early as October 1967, when the Australian Embassy in Washington received the text of a US *Aide-Memoire* already presented to its North Atlantic Treaty Organisation allies.³⁵

³⁴ *Cabinet Submission No. 69: Report of the Defence Committee, Department of Defence, 26 April 1968.* [50]. At p. 15, paragraphs 45, 46. Available WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_18.htm

³⁵ Document A 1838/275: 719/10/6, Pt. 1 [93]. (9 October 1967). *Inward Cablegram No. 4238 from Australian Embassy, Washington, to Department of External Affairs, Canberra.* Canberra: Australian Archives. Classified Secret.

A comprehensive review of the progress and difficulties which the United States was then encountering in negotiations with the Soviet Union at the Eighteen Nation Disarmament Committee in Geneva, it provided the Australian Government with several advantages. First, it constituted an assurance that the US intended to consult extensively with Australia on the non-proliferation question. Second, it was evidence of American willingness to include in its consultations (without any real need to do so) the substance of its discussions with its NATO allies and the Euratom states. Both points indicated to the Australian government the seriousness with which the United States viewed Australia's support for the NPT. Finally, it established a firm foundation on which Australia's advocates of the new treaty could build their support for non-proliferation within Australia, over the objections of its opponents in the upper levels of the Australian bureaucracy, and within Cabinet.

As the negotiations progressed in Geneva, further equally important US *Aides-Memoires* were forthcoming. For example, the revised US Draft Text of the treaty of 2 November 1967, containing proposals for the terms of Article III on safeguards provision, was the subject of a US *Aide-Memoire* of 13 November 1967 from the United States to *all* its allies, including Australia.³⁶ However, the strongest evidence of the strength of America's concern over Australia's resistance can be found in United States Government *Aides-Memoires* provided after 14 March 1968, when the final Draft Text was submitted by the ENDC to the United Nations General Assembly.

On 25 March 1968, the United States Embassy in Canberra delivered an *Aide-Memoire* to the Australian Government which presented the salient features of the Draft Text, together with an appreciation of its purpose, operation and place within the wider goals of nuclear arms control.³⁷ Intended as a formal request by the United States Government to the Australian Government seeking its support for the treaty, the document ended with a series of "verbal points" which leave no room for doubt that the US confidently expected Australia to adhere to the treaty in its final draft form. In summary, the United States Government:

³⁶ Document A 1838/346: 719/10/6, Pt. 3 [175]. (15 November 1967). *Inward Cablegram No. 4694 from Australian Embassy, Washington to Department of External Affairs, Canberra*. Canberra: Australian Archives. Classified Secret.

³⁷ Document A 1838/346: TS 919/10/5, Pt. 6 [38]. (25 March 1968). *Aide-Memoire of the Government of the United States of America, United States Embassy, Canberra. 25 March 1968*. Canberra: Australian Archives.

... attach[ed] great importance to the early conclusion of an NPT which will have the widest possible acceptance; ... hope[d] that the [Australian] Government will support endorsement of the draft NPT by the resumed session of the 22nd General Assembly [and would welcome] [Australia's] public announcement ... in support of the draft treaty, made prior to the resumed session and in open debate.³⁸

The United States was to be disappointed in its expectation of immediate Australian accession to all its requests, as its negotiating strategy with Australia at New York (discussed above) illustrates. Nevertheless, determined to avoid misunderstandings with the Australian Government, Washington resorted once again to the formal expression of its position, following those negotiations.

In its final two *Aides-Memoires* to the Australian Government before US Ambassador Goldberg's interventions in the First Committee debate, the United States Government laid out its understanding and interpretation of each of the major concerns of the Australian Government, thus marking a watershed in its discussions with Canberra over the interpretation of the treaty's terms, and in the accommodations it was prepared to make in order to bring Australia in line with the Western Alliance.³⁹

As such, each deserves close scrutiny. Had the continuous US/Australia diplomatic dialogue on the evolving non-proliferation treaty, infused as it was with the effects of the bitter internal struggle in Australia for nuclear policy supremacy, gained America's attention? If so, exactly how far was the United States Government prepared to go in order to placate its surprisingly dubious and resistant Western Pacific ally? Furthermore, had Australia - the accidental recalcitrant - in fact made a real difference in the development of the conventional international law of nuclear proliferation?

³⁸ *Ibid.*

³⁹ Document A 1838/346: TS 919/10/5, Pt. 10 [108]. (6 May 1968). *Aide-Memoire of the Government of the United States of America, United States Embassy, Canberra. 6 May 1968*. Canberra: Australian Archives.

Document A 1838/346: 719/10/6, Pt. 15 [156]. (13 May 1968). *Aide-Memoire of the Government of the United States of America, United States Embassy, Canberra. 13 May 1968*. Canberra: Australian Archives.

As discussed below, the United States would subsequently emphasise that it anticipated detailed and technical discussions with Australia, at a later date, over issues surrounding model Safeguards Agreements and the implementation of safeguards, both bilaterally and in the forum of the IAEA. *Infra*. At Note 49.

Denouement

In its *Aide-Memoire* of 6 May, the United States Government - confirming the substance of ACDA Assistant Director Fisher's position in negotiations four days earlier - acknowledged Australia's need for authoritative interpretations of the meaning of "manufacture" in Articles I and II, and the implementation of the safeguards provisions of Article III.

The Note repeated Ambassador Fisher's assertion that Australia's suggested definition of "manufacture" could not stand, since its assumption that Article II allowed any research or manufacturing process relevant to nuclear explosive devices as long as it served some other purpose was an "apparent misunderstanding".⁴⁰ Nevertheless, the US would give further consideration both to that question, and to Australia's concerns over safeguards implementation. It then clearly stated that many of Australia's concerns would be met by its earlier statements to the ENDC in Geneva, and in its forthcoming interpretations before the US Senate ratification hearings.⁴¹

Finally, the *Aide-Memoire* offered a singular *quid pro quo*. If the Australian side would refrain from raising complex and highly sensitive questions in the UN First Committee debate on "manufacture" of nuclear weapons and the implementation of safeguards, the United States would undertake to address Australia's need for flexibility on Articles I and II. It made no mention of how this would be achieved.

Couched in diplomatic language, the United States offered Australia a bargain: "refrain from airing your grievances in open debate (or with the Soviet Union) and the US will accommodate your concerns." Specifically, in respect of the interpretation of "manufacture", the United States hoped that the views it developed could:

... form the basis for any necessary discussion in the US Senate as well as in the Australian Parliament in connection with ratification proceedings, but that issues would not be raised publicly earlier than necessary for that purpose. (emphasis added)⁴²

As a final balm, the State Department stressed that:

⁴⁰ See Chapter Four, at Notes 114, 115.

⁴¹ *Ibid* (6 May 1968). At p. 1. Australia's explicit preferred interpretation of the term "manufacture", and Ambassador Fisher's express objections to it, are examined above. At Note 14.

⁴² *Ibid*. At p. 2.

.... in dealing with questions raised by the Australian Government, the United States will take fully into account the Australian concern that it not be put in a disadvantageous position vis-à-vis other non-nuclear countries in Asia.⁴³

The "further consideration" promised by the United States on "manufacture" and safeguards implementation finally appeared in America's last *Aide-Memoire* to Australia, dated 13 May 1968, on acceptable interpretations of the terms of the NPT.⁴⁴ Handed to Ambassador Shaw in New York by Ambassador Fisher, it contained an expression of the full extent of flexibility in the interpretation of the treaty to which the United States Government was prepared to agree in return for Australia's support. The interpretations and clarifications it makes may be summarised as follows:

- *"manufacture" as used in Articles I and II*

A comprehensive definition was not currently possible. Any general definition or interpretation, unrelated to specific factual situations, could not deal satisfactorily with all possible scenarios.⁴⁵ Nevertheless, general observations could be made in respect of specific activity. For example, the construction of an experimental or prototype nuclear explosive device would be covered by the term "manufacture", as would the production of components [such as trigger mechanisms] which could only have relevance to an explosive nuclear device.⁴⁶

Furthermore, activities which were under the scrutiny of safeguards would be less likely than otherwise to attract suspicion as to their purpose. The US illustrated the tenor of its position with examples of activities it did *not* consider to be violations of the prohibitions in Article II. Neither enrichment nor stockpiling of fissionable material in connection with a peaceful nuclear programme would violate Article II, so long as they were placed under Article III safeguards. The development of both safeguarded power

⁴³ *Ibid.* At p. 3.

⁴⁴ *Op. cit.* At Note 39 (13 May 1968).

⁴⁵ *Ibid.* At p. 1.

⁴⁶ *Ibid.* At p. 2.

and research reactors fueled by plutonium, and of fast-breeder reactors, would clearly also be permitted by the application of Article II.⁴⁷

Once again, the United States assured the Australian Government that it fully understood Australian concerns about being placed at a disadvantageous position in regard to other non-nuclear states in Asia. It would do all in its power to ensure that the NPT had no such consequence, but did not elaborate on the means available to achieve that result.⁴⁸

- *Safeguards arrangements and implementation*

In regard to safeguards arrangements themselves, the US addressed the desirability of implementing a "model agreement" for use by each State Party in its bilateral Safeguards Agreement with the International Atomic Energy Agency. Australia, it noted, had expressed some concern that failure to do so would result in divergent rights and responsibilities as between parties, since safeguards requirements would change over time, and there appeared limited scope to amend bilateral agreement. In addition, it seemed likely that states would be obliged to accept any changes to the safeguards system (such as additions to the IAEA's definition of "source or special material") over time, without a right of rejection.⁴⁹

While re-stating its strong opposition to Australia raising in the First Committee debate any matters in connection with a model safeguard agreement or additional interpretations of Article III, the United States *Aide-Memoire* of 13 May made clear its view that such matters should be resolved in the IAEA.

The United States would wish to consult closely, at a later date, with Australia on a number of "highly detailed, technical considerations" both bilaterally, and in the IAEA forum at Vienna.⁵⁰ It did not wish to upset the "delicate compromise" reached in negotiations at Geneva over Article III safeguards - an outcome which could be inimical to both Australian and United States interests.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ See Chapter Four, at Note 131.

⁵⁰ *Op. cit.* At Note 39, p. 3.

Nevertheless, the US was prepared to make a series of comments on specific points of concern raised by the Australian Government. First, States Parties to the NPT would retain the right, granted under Article 2 of the IAEA Inspectors Document, to reject any IAEA Safeguards Inspector (such as those from states under Soviet influence).⁵¹

Second, mining operations and ore-processing facilities were specifically excluded from safeguards inspections. The new NPT bilateral Safeguards Agreements between the IAEA and individual States Parties were expected to incorporate, by reference, the relevant portions of the Agency's safeguards system documents. These documents specifically excluded mines and ore-processing plants from their definition of "principle nuclear facilities" (as defined in Article III (1) of the NPT).⁵²

Third, changes to a negotiated Safeguards Agreement could only be made with the consent of both parties to it, ideally in terms of a procedure agreed in advance.⁵³

Finally, the United States, after consultation with the IAEA, did not regard the stockpiling provisions of Article XII (A) (5) of its Statute, on measures to prevent stockpiling of fissionable material by states, as having any relevance to safeguards arrangements. Stockpiling of fissionable material was not prohibited by the treaty, so long as stockpiled material was subject to safeguards inspection to prevent its diversion to weapons manufacture.⁵⁴

These interpretations of the terms of the new non-proliferation treaty were authoritative, definitive, and would be valuable to all uncommitted states at the United Nations First Committee debate. America's request that their details remain unannounced at that stage of the treaty's evolution (a position it rapidly reversed) does not detract from their importance as a crucial step in the foundation of its operational life.

⁵¹ *Ibid.* At p. 4. IAEA Document GC(V)INF/39. Article 2 empowers the Director General of the IAEA to designate an alternative inspector, and to refer to the Board of Governors, for "appropriate action", the repeated refusal of a state to accept a designated inspector, if that refusal impedes the inspection activities of the Agency. McKnight, A. (1971). *Atomic safeguards: A study in international verification*. New York: UNIDIR. At p. 112. Gorove provides a comprehensive contemporaneous analysis of the privileges and immunities of safeguards inspectors under the terms of individual *Agreements on the Privileges and Immunities of the IAEA* concluded between states and the Agency. Gorove, S. (1970). Privileges and immunities of international atomic inspectors. *Fordham Law Review*, 38, pp. 497-508.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid. Op. Cit.* At Note 22. At Appendix III.

Given the importance of this *Aide-Memoire* to other states in their decision whether to support the Draft Text in the General Assembly, it is not surprising that its existence, if not its content, was the subject of immediate speculation at the United Nations in New York. Australian diplomats were approached on the following day by their Belgian counterparts seeking details of the content of "the *Aide-Memoire* we had received from the Americans".⁵⁵

Australia's representatives refused the Belgian request, and denied any knowledge of the source of the leak, which by then was causing consternation within the US Delegation. The Americans expressed concern that a position had arisen in which other member states knew that the United States had given particular assurances to another member state on a matter of common concern.⁵⁶ Since Belgium was (and remains) a member state of both the European Atomic Energy Community ('Euratom') and the North Atlantic Treaty Organisation, its anxiety to know the content of the US Note to Australia was an indicator both of wider Allied concern over the NPT, and of Australia's standing at the United Nations.⁵⁷

Although Belgium was not represented on the Eighteen Nation Disarmament Committee in Geneva, as a member state of the North Atlantic Treaty Organisation it had been included in the discussions held between the United States and its NATO allies since the early stages of negotiations within the ENDC (during which serious objections had been raised by the Federal Republic of Germany and Italy). For example, intensive negotiations had occurred between the US and each of its NATO allies following the conclusion of the Twenty First Session of the UN General Assembly in the latter months of 1966.⁵⁸ Thus, the depth and breadth of US consultations over the proposed NPT, and its negotiations with the Soviet Union, makes the Belgian move on

⁵⁵ Document A 1838/346: 719/10/6, Pt. 5 [151]. (14 May 1968). *Inward Cablegram UN. 809 from the Australian Mission to the United Nations, New York, to the Department of External Affairs, Canberra*. Canberra: Australian Archives.

⁵⁶ Document A 1838/346: 719/10/6, Pt. 5 [152]. (17 May 1968). *Inward Cablegram UN. 833 from the Australian Mission to the United Nations, New York to the Department of External Affairs, Canberra*. Canberra: Australian Archives.

⁵⁷ *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At pp. xiii, xiv. The Belgian Delegation (and, presumably, other Delegations which were aware of the *Aide-Memoire*) could be left in little doubt that Australia was receiving diplomatic attention from the US to an extent beyond what many states at the UN General Assembly would normally expect.

⁵⁸ *Ibid.*

the leaked existence of the *Aide-Memoire* to Australia difficult to explain. Nevertheless, this incident may have been a catalyst for the widespread dissemination of the United States' interpretations contained in its *Aide-Memoire* to Australia of 13 May. Australian Ambassador Shaw had stated to senior US Delegation members that Australia saw advantages in having the widest possible acceptance among parties to the treaty of the explanations and assurances which the *Aide-Memoire* contained.

He was rewarded three days later by the US Delegation's revelation that, in fact, the United States Government had now distributed the text of the *Aide-Memoire* to all member states of Euratom, together with all other NATO member state delegations in New York, as well as those of Canada and Japan. It had already given a copy to the United Kingdom.⁵⁹ Circulation of the Note, the US Mission agreed:

... might be considered as helping to consolidate the interpretations which [the Australian Government] had itself sought.⁶⁰

The significance of this development cannot be easily over-stated. Australia had, through its insistence on explanations and interpretations of the meaning of crucial components of the newly negotiated treaty, demonstrated to the rest of the world a number of important realities. It had shown, firstly, that the United States could be influenced in the implementation of nuclear arms control measures by non-nuclear middle powers whose support the US valued as a component of the Western Alliance.

Furthermore, Australia had demonstrated that, through its ability to focus American attention on matters it preferred to gloss over or postpone, it could establish some degree of guidance and direction in the nuclear decision-making of a second nuclear weapon state (the United Kingdom) and other important near-nuclear states (such as the Euratom states, Japan, Canada and South Africa).

⁵⁹ *Supra*. At Note 56. The United Kingdom Delegation immediately sought Australia's reaction to the US Note, and asked whether Australia would be seeking similar interpretations from the United Kingdom Government. Ambassador Shaw sought urgent advice from Australia on whether the Australian Delegation should pursue the question. However, there is no evidence of a response to his request. Document A 1838/346: TS 919/10/5, Pt. 10 [111]. (14 May 1968). *Inward Cablegram UN. 808 from the Australian Delegation to the United Nations, New York to the Department of External Affairs, Canberra*. Canberra: Australian Archives.

Ten days later, South Africa was added to the list of states supplied with the United States *Aide-Memoire* to Australia. Document A 1838/346: 719/10/6, Pt. 5. [149]. (21 May 1968). *Inward Cablegram UN 850 from the Australian Delegation to the United Nations, New York to the Department of External Affairs, Canberra*. Canberra: Australian Archives.

⁶⁰ *Ibid.* (17 May 1968). At p. 2.

Finally, Australia's success had established a pattern for the operation of multilateral arms control treaties within which it was possible to build an effective treaty whose terms were (given their wide accession) very difficult to amend. By establishing clear meanings and explanations of the political, as well as legal, obligations undertaken by the treaty's adherents, the rigidities inherent in global agreements of this kind could be tempered with operational flexibility.

Australia's developing role in this process would eventually give it a cachet and legitimacy in international arms control activities well beyond what could reasonably be expected of a state of its economic size, strategic importance and level of engagement in nuclear and other international affairs.

The Public Face of Private Understandings

The understandings, accommodations and explanations which the United States and Australia had agreed were implicit in the terms of the new treaty were not necessarily readily apparent in the public statements of either. An analysis of the pronouncements of both countries at the UN debate, and of United States Government representatives before the US Senate, illustrates the ways in which they were tailored to take account of the need (in America's case) to maximise support, or (in Australia's case) to accommodate domestic sensitivities.

For example, following the advice which the United States had urged upon Australia, its Ambassador to the United Nations, Arthur Goldberg, made no mention, in either of his interventions in the First Committee debate, of issues surrounding the implementation of safeguards arrangements, or the precise meaning of the term "manufacture" in Articles I and II.⁶¹ Instead, he dealt in his first intervention of 26 March with the NPT's structure and goals, the balance of obligations and benefits which it created between the nuclear and non-nuclear weapon states, and with security

⁶¹ *Supra*. At Note 57, pp. 115-116. Document A 1838/346: 719/10/6, Pt. 5 [155]. (15 May 1968). *Inward Cablegram No. UN 813 from the Australian Mission to the United Nations, New York to the Department of External Affairs, Canberra*. Canberra: Australian Archives. Ambassador Goldberg did, however, allude to the various concerns of states in respect of the safeguards arrangements in Article III in his statement to the UN General Assembly of 31 May, following the presentation of the final amended text of the Draft NPT to the First Committee. Those comments will be addressed below.

assurances to non-nuclear weapon states combined with further disarmament measures, as required by Article VI.⁶²

Even in his more detailed remarks of 15 May, Ambassador Goldberg made no mention of either of Australia's major concerns, nor of issues surrounding them. Rather, he focused on the strength of security assurances agreed between the United States, the United Kingdom and the Soviet Union.⁶³ While also pointing to a number of amendments to the NPT text which had been accepted following suggestions from several states (such as the need for nuclear explosions for peaceful purposes and five-yearly review conferences) he again did not make reference to the two primary Australian concerns.⁶⁴

As the United States had stressed in earlier discussions with the Australian Mission in New York, it clearly did not consider the UN First Committee an appropriate forum for debate on contentious issues which were capable of causing controversy and dissent among states sufficient to threaten the adoption of the treaty.

Australia's Ambassador to the United Nations, Patrick Shaw, finally made Australia's statement in the debate on 17 May. It is clear from the text of Shaw's remarks that the delicate balance of influence over Cabinet decisions between the pragmatic "devil's advocacy" of senior officers in the Department of External Affairs (led by Malcolm Booker and endorsed by Secretary Plimsoll) and the nuclear nationalists, within and outside Cabinet, was still finely poised.

As discussed earlier, DEA had been steadily directing the nuclear nationalists towards the principles of anti-proliferation through its strategy of engagement with the NPT *on Australia's terms*. For DEA, the primary goal remained the achievement of a policy against nuclear proliferation which was capable of support within the Gorton Cabinet. The tone and substance of Ambassador Shaw's speech indicates that DEA

⁶² *Ibid.* At Note 57, p. 115.

⁶³ *Op. cit.* At Notes 6 and 57, p. 155. The Tripartite Proposal on Security Assurances of 7 March 1968, made by the three co-sponsoring nuclear weapon states, comprised a Draft Security Council Resolution (approved by the United Nations Security Council on 19 July 1968 by a vote of 10 to 0, with the abstentions of Algeria, Brazil, France, India and Pakistan). The Resolution's substantive section (paragraph 2) welcomed assurances by the co-sponsoring states that they would provide or support immediate assistance, in accordance with the UN Charter, to any non-nuclear weapon State Party to the NPT that was the victim of an act, or an object of a threat, of aggression in which nuclear weapons were used.

⁶⁴ *Ibid.* At Note 6, pp. 7-12.

could not yet be certain of having reached that point. Certainly, the speech traced the outlines of Booker's rationale behind his vision of Australia's role in the treaty's establishment. It was his suggestion, expressed only in his official capacity, that, should Australia's concerns not be met - with certainty - at the time of its opening for signature, then Australia could sign, but subsequently refrain from ratification until all doubts had been removed.⁶⁵ Such a solution was a compromise not only for Australia in its negotiating stance with the United States over the strength of its support for the treaty, but also in terms of the extreme positions of those on either side of the domestic Australian nuclear debate.

Booker's even more prescient observation was that, by taking a questioning attitude towards the Draft Text of the NPT, Australia would gain greater influence than otherwise over its final form, and would be better able to persuade a sufficiently wide group of non-nuclear (but nuclear threshold) countries to support it.⁶⁶

Nevertheless, Shaw's speech, which had been vetted in detail in Canberra, did not reflect the nuances of an Australian nuclear policy still in transition, nor the views of an Australian Government convinced by United States reassurances. Although he ended by stating that Australia would support the General Assembly First Committee resolution endorsing the treaty, his speech was a clear signal to the United States that it should not, even at that stage, *count* on Australian support. In short, the screw was still being turned.

While applauding the proposed security guarantees to be made by the three Depository States,⁶⁷ Ambassador Shaw signalled Australia's discontent by laying out a

⁶⁵ Document A 1838/346: TS 919/10/5, Pt. 5 [30]. (14 March 1968). *Memorandum from M.R. Booker, First Assistant Secretary, Division II, to the Secretary, Department of External Affairs* [Plimsoll], (14 March 1968). Canberra: Australian Archives. At p. 3. Although Ambassador Shaw's speech did not touch on the questions of signature or ratification of the treaty (merely expressing Australia's support for an effective treaty, and promising a vote in favour of a resolution recommending its text to the Plenary Session of the General Assembly) it was implicit in his remarks that Australia held reservations over the Draft NPT on which it would require resolution at a future time. To this extent, Booker's strategy for engaging with the NPT on Australia's terms was premised on the practicalities of attaining a nuclear proliferation policy position which was capable of support within the Australian Cabinet. Draft Treaty on the Non-Proliferation of Nuclear Weapons. (May, 1968). *Current Notes on International Affairs*, 39 (5), pp. 206-210. At p. 210.

⁶⁶ *Ibid.* At p. 3. The latter goal was considered an essential feature of a supportable NPT in the Australian Cabinet's Decision No. 165 of 29 April 1968. *Op. cit.* At Note 4.

⁶⁷ Draft Treaty on the Non-Proliferation of Nuclear Weapons. (1968). *Current Notes on International Affairs*, 39 (5), pp. 206-210. At p. 208.

set of primary conditions for the treaty's success which did not meet American requests for full support, nor its request for Australia to avoid all controversial issues. Shaw pointed to the need for support for the NPT which extended well beyond the forty state minimum accession level required to bring the treaty into effect. Given the ultimate nuclear response of nuclear-capable states under serious threat, but without the alliance-based protection of a nuclear weapon state, the attitude of all such states would, he stated, be a key determinant of Australia's faith in the effectiveness of the treaty.⁶⁸ In doing so, he expressed the overriding concern of those in the Australian Government who feared the result of an ineffective treaty:

Clearly, should relations between [the nuclear weapon States Parties to the treaty] significantly deteriorate and their co-operation diminish, the prospects for our stable management of international life, the peaceful settlement of disputes and the effective deterrence of aggression would also diminish. In such circumstances, it would be unrealistic to expect nations exposed to threat, nuclear or conventional, to deny themselves the most effective means of defence they could acquire, *including nuclear weapons*. (emphasis added)⁶⁹

Furthermore, Shaw dealt at some length with Article III, on safeguards against diversion of nuclear material, to the undoubted consternation of the US New York Delegation, the State Department and the Arms Control and Disarmament Agency. Reiterating such Australian anxieties as the inclusion of safeguards over mining and processing activities, and the need for certainty in terms of safeguards obligations undertaken, Shaw stated Australia's final position on the meaning of "manufacture" in Articles I and II. This version was neither that which it had urged on the US negotiating mission in Canberra during the previous month, nor that arrived at in negotiations with US representatives in New York on 2 May:

The Australian Delegation, in relation to the provisions of Article III (3) and Article IV of the treaty, states its understanding that, under the treaty, no nuclear activity in research, development, production or use is prohibited, nor can the supply of knowledge, materials or equipment be denied to non-nuclear weapon states, *until it is clearly established that such activity or supply will be used for the manufacture of nuclear weapons, or other nuclear explosive devices*. (emphasis added)⁷⁰

⁶⁸ *Ibid.* Article IX (3) of the Draft Nuclear Non-proliferation Treaty.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* At p. 209. See Chapter Four, at Note 114..

The newly proposed interpretation clearly conceded ground to the US rejection of Australia's initial proposal that all nuclear activity should be permitted if it had a conceivable peaceful purpose. On the other hand, Australia now sought to place the burden of responsibility for showing that nuclear activities were for the purpose of manufacturing nuclear weapons on the IAEA, but to an Australian standard of proof.

Shaw stressed that strict and scrupulous observance of Article III (together with the peaceful-use provisions of Article IV) would be a basic condition for the successful operation of the treaty.

The response of the United States Government to Australia's General Assembly statement was muted. Its most promising avenue of protest was the co-incidental visit of Prime Minister Gorton to Washington from 27 May to 1 June.⁷¹ Gorton had certainly been fully briefed on the non-proliferation question in preparation for his meetings with President Johnson and members of his Administration.⁷²

In addition, as noted earlier, President Johnson had been taking a keen personal interest in the Geneva negotiation of the draft NPT text. The level of the American President's involvement had been emphasised, only two months previously, by the Australian Ambassador to Washington, Sir Keith Waller, in a strongly worded warning to the Australian Government. Referring to the consistent support which Australia had expressed to the United States for the principles of nuclear non-proliferation, Ambassador Waller pointed to possible severe repercussions should Australia fail to accede to the treaty itself.⁷³

⁷¹ Ramsey, A. (1968, May 29). LBJ promises US will stay in ANZUS pact. *The Australian*, p. 1. Ramsey, A. (1968, June 3). What Mr. Gorton really meant in Washington. *The Australian*, pp. 8, 9.

⁷² Document A 1838/346: TS 919/10/5, Pt. 16 [66]. (3 May 1968). *Draft treaty on the Non-Proliferation of Nuclear Weapons: Notes for Prime Minister's brief for visit to Washington*. Canberra: Australian Archives. Classified Top Secret.

⁷³ Document A 1838/346: 719/10/6, Pt. 3 [162]. (25 March 1968). *Cablegram 1264 from the Australian Ambassador to Washington to the Department of External Affairs, Canberra*. Canberra: Australian Archives. Classified Secret and Guard. The repercussions were expressed by Waller as concern at all levels of the Johnson Administration, together with wider deleterious effects on press and public opinion, perhaps resulting in "spill over" effects on the wider aspects of the Australia/ United States relationship. At p. 2.

Although President Johnson had announced his decision not to seek re-election on 31 March 1968, he nevertheless continued to seek the completion of the ratification process in the Congress before the presidential election campaign entered its final months (i.e. by July 1968). Maddock, S.J. (1997). The nth country conundrum: The American and Soviet quest for nonproliferation, 1945 - 1970. Doctoral dissertation, University of Connecticut. *Dissertation Abstracts International*, 58 - 06A, 2362. At p. 514.

It could be anticipated, therefore, that the question of Australia's fully-committed support for the United States would be high on the agenda set for Gorton's discussions with the United States Government. However, no documentary evidence exists, whether from official archives, the popular press or elsewhere, indicating that the fate of the Draft NPT treaty text in the UN General Assembly was discussed by Gorton with his American hosts. Although the question of Australia's security in Asia, guaranteed through the ANZUS Treaty, was certainly raised in Washington,⁷⁴ its implications for Australia's co-operation over the NPT were neither officially noted nor publicly reported.

The second US response to the Australian statement appears to have been an attempt to have Australia agree to co-sponsor the General Assembly First Committee resolution endorsing the treaty text, thereby reinforcing its already promised favourable vote. Although, by the end of May, twenty-eight states had agreed to act as co-sponsors of the resolution,⁷⁵ an approach from De Palma of the US Delegation in New York asking for Australia's co-sponsorship was met with a firm refusal.⁷⁶ Informal exchanges between Australian, United States and Soviet representatives in New York at that time unremarkably disclosed both the "surprise and disappointment" of the Soviet Union to Australia's UN statement, and the less forcefully expressed consternation of the US Mission.⁷⁷

The Limits of Co-operation

However disappointed the United States or other co-sponsoring states may have been over Australia's refusal, finally, to be persuaded of the unalloyed benefits of the new regime of non-proliferation which the NPT sought to establish, the die was cast. The

⁷⁴ *Op. cit.* At Note 71.

⁷⁵ Document A 1838/346: 719/10/6, Pt. 5 [147]. (25 May 1968). *Inward Cablegram UN 891 from the Australian Mission in New York to the Department of External Affairs, Canberra*. Canberra: Australian Archives.

⁷⁶ Document A 1838/346: 719/10/6, Pt. 5 [144]. (28 May 1968). *Inward Cablegram UN 910 from the Australian Mission to the United Nations, New York to the Department of External Affairs, Canberra*. Canberra: Australian Archives.

⁷⁷ *Ibid.* At pp. 2, 4.

United States had shown a remarkable willingness to accommodate the concerns expressed by its small but significant Pacific ally, and, in doing so, had itself gained a greater understanding of the theoretical and operational shortcomings of its nuclear non-proliferation strategy, and of the treaty itself. On the other hand, Australia (and especially senior strategists at the Department of External Affairs) had exercised a level of influence over United States nuclear policy beyond what it had any right to expect.

In the end, however, accommodations and understandings had found their limit. The United States had drawn a line under its efforts to persuade Australia on the merits of its case, while the assurances and interpretations extracted from America had proved insufficient to allow the Australian Cabinet to support immediate signature of the treaty. Nevertheless, Australia had shown itself capable, when its political will and perceived national interests were sufficiently strong, of impelling its superpower ally to take steps which it would not otherwise have taken.

The United States Ambassador to the United Nations, Ambassador Goldberg, made a closing statement to the General Assembly First Committee on 31 May 1968, following the conclusion of its debate on the final treaty text. In it, he described amendments to the treaty text which had resulted in a revised General Assembly resolution.

Changes to Article IV, which had been agreed upon at the last minute with the Soviet Union, strengthened the provisions for the sharing of nuclear information and material for peaceful purposes with developing countries.⁷⁸ In addition, Article V had been amended to provide for the immediate institution of a peaceful nuclear explosive service, under appropriate international supervision.

Finally, Article IX had been changed to provide for the treaty's entry into force following the deposit of instruments of ratification by the three depository states, rather than all five nuclear weapon states, and forty other signatories. This latter amendment had been agreed to in order to preclude the possibility of delay in the entry into force of the treaty through the refusal of either France or China to sign and ratify it.⁷⁹

⁷⁸ Document A 1838/346: 719/10/6, Pt. 5. [143]. (31 May 1968). *Cablegram No. UN 944 from the Australian Mission to the United Nations, New York to the Department of External Affairs, Canberra*. Canberra: Australian Archives. At pp. 3, 4. The effect of the change was to stress the right of States Parties to acquire nuclear materials and equipment, in addition to scientific and technological information. It also stressed the obligations of those States Parties able to do so to co-operate in contributing to the further development of nuclear energy for peaceful purposes.

⁷⁹ *Op. cit.* At Note 57, pp. 123, 124.

Since these changes had been called for by a number of states, the effect of Australia's insistence on the importance of its access to nuclear technology (noted in Cabinet Decision No. 165) and its interest in nationally controlled peaceful-use nuclear explosions (noted by Ambassador Shaw in his First Committee speech) is impossible to judge. More certain is Australia's influence in Ambassador Goldberg's express reference to the exclusion from safeguards monitoring of uranium mining and initial processing, in which he reiterated the United States' position that safeguards would continue to be imposed only at the uranium concentrate stage.⁸⁰

In any event, the full extent of Australia's contribution to the evolution of the treaty (as contained in the United States *Aide-Memoire* of 13 May) became clear from the assurances received from both the United States Arms Control and Disarmament Agency and the US Delegation to the United Nations in New York that all the points of substance in the *Aide-Memoire* had been incorporated in the written submission sent to the Senate Foreign Relations Committee by the Johnson Administration.⁸¹

United States Senate Ratification Hearings

The revised resolution, incorporating the revised (and final) draft NPT treaty text, was adopted by the plenary General Assembly on 12 June 1968 by a vote of 95 to 4, with 21 abstentions. Among the abstaining nations were four near-nuclear or nuclear-capable states (Argentina, Brazil, India and Spain) and one declared nuclear weapon state (France). China voted in favour of the resolution.⁸²

⁸⁰ *Supra*, At Note 78, p. 9.

⁸¹ Document A 1838/346: TS 919/10/5, Pt. 4 [114]. (18 July 1968). *Cablegram No 3324 from the Australian Embassy, Washington to the Department of External Affairs, Canberra*. Canberra: Australian Archives.

Document A 1838/346: TS 919/10/5, Pt. 16 [56]. (31 May 1968). *Progress report in regard to points of concern to Australia on the Non-proliferation Treaty*. Department of External Affairs, Canberra. Canberra: Australian Archives. At p. 5.

⁸² United Nations General Assembly Resolution 2373 (XXII): Treaty on the Nonproliferation of Nuclear Weapons, June 12, 1968. A/RES/2373 (XXII), June 18, 1968. The First Committee of the General Assembly had approved the revised resolution commending the draft treaty on 10 June 1968 by a vote of 92 in favour, 4 against, with 22 abstentions. It was then transmitted to the plenary General Assembly for final adoption two days later.

The *Nuclear Non-Proliferation Treaty* was opened for signature in Washington, London and Moscow on 1 July 1968. It was signed simultaneously on that day by the three Depository Governments - the United States, the United Kingdom and the Soviet Union - and by 59 other nations.⁸³ Few NATO states (including Italy and West Germany), and no near-nuclear or nuclear-capable states, including Australia, were among the initial signatories. During the signing ceremony at the White House, President Johnson described the treaty as:

... a reassuring and hopeful moment ... the most important international agreement since the beginning of the nuclear age.⁸⁴

Expressing the hope that it would be accepted by virtually all nations, he said that the treaty had three simple purposes:

- to prevent nuclear weapons proliferation;
- to assure to non-nuclear states "the full peaceful benefits of the atom";
- to commit the nuclear powers "to move forward towards effective measures of arms control and disarmament".⁸⁵

With the goal of securing immediate ratification of the treaty, United States Secretary of State Rusk submitted a report on the negotiating history and provisions of the treaty to President Johnson on the following day. One week later, the President transmitted it to the United States Senate with a request for the treaty's immediate ratification.⁸⁶

Secretary Rusk's report for consideration by the Senate Foreign Relations Committee dealt with the broad outline of the treaty text, together with a summary of its eleven articles. His description and analysis of each article are valuable for their clarity and simplicity of expression and exposition, which made the intent of the treaty - in

⁸³ United States Arms Control and Disarmament Agency (2001). *Treaty on the Non-proliferation of Nuclear Weapons* [on-line]. Available WWW: <http://WWW.acda.gov/treaties/npt1.htm> . *Op. cit.* at Note 73 (Maddock). At p. 518.

⁸⁴ *Op. cit.* At Note 73, p. 518.

⁸⁵ *Op. cit.* At Note 9, p. 129.

⁸⁶ *Ibid.*

both its individual components and as a whole - self-evident.⁸⁷ They also dispelled many residual doubts over the approach taken by the Johnson Administration to many of the points of concern still exercising the minds of the Australian nuclear policy protagonists.

In addition to Secretary Rusk's report, the Senate Foreign Relations Committee received the testimony of Glenn Seaborg, Chairman of the United States Atomic Energy Commission, on the relationship of the new NPT to the peaceful use of nuclear energy. He included in his evidence the role of nuclear material diversion safeguards, as well as the responsibility of nuclear powers to share with non-nuclear states the benefits of their knowledge and expertise in nuclear technologies.⁸⁸

A direct comparison is therefore possible between the avowed concerns of the Australian Government, as outlined in Cabinet Decision No. 165, and the degree to which the United States Government had succeeded in answering them in open-forum public policy statements (rather than merely in private assurances and accommodations). Thus, a review of Secretary Rusk's and Chairman Seaborg's analyses of the relevant articles of the treaty in their report and testimony in the US Senate can be contrasted critically with the decisive concerns of the Australian Government (discussed in Chapter Four).⁸⁹

Explicit statements before the US Senate which add to the authority and clarity of America's earlier bilateral assurances to Australia were limited to the Preamble, and the most important elements of the treaty's operational articles (Articles I to IV inclusive). Issues less central to US concerns (but nevertheless of concern in Australia) such as the establishment of regional nuclear-free zones (Article VII) and duration and

⁸⁷ *Op. cit.* At Note 83, pp. 173-180. Rusk told the Senate Foreign Relations Committee, in oral testimony on 11 July 1968, that:

Nuclear proliferation could add a new and dangerous dimension to historic ethnic and territorial disputes between nations In short, nuclear weapons proliferation could stimulate a preventive war.

Loewenheim, F.L. (1994). Dean Rusk: Diplomacy of principle. In G.A. Craig & F.L. Loewenheim (Eds.), *The diplomats - 1939 - 1979* (pp. 495-536). Princeton, N.J.: Princeton University Press. At p. 522.

⁸⁸ *Op. cit.* At Note 7.

⁸⁹ *Supra.* At Note 81. Although the United States Government had agreed to incorporate in its Senate testimony the undertakings it had expressed in its *Aide-Memoire* of 13 May, in the event they were dispersed throughout the US government's testimony before the United States Senate. Nevertheless, the US Arms Control and Disarmament Agency assured the Australian Embassy in Washington that "all points of substance covered in the *Aide-Memoire* have been included in the written submission to the Senate Committee by the Administration." See Appendix II for the full text of the NPT.

withdrawal from the treaty (Article X) were not enlarged upon before the Senate Hearings.

- Preamble

The twelve preambular paragraphs, Rusk noted, expressed the consensus of the parties on the purposes for which the NPT had been negotiated.⁹⁰ Thus, the Preamble was, for Australia, a general assurance that the principles and projected mechanisms which the treaty incorporated in its substantive articles would have the comprehensive support of its adherents. More specifically, Australia's concern that the NPT should attract the support of the bulk of nuclear-capable states (including India, Pakistan, Indonesia and Japan) was based on the premise that, having signed and ratified the treaty instrument, those states would be bound in international law to the general principles of nuclear non-proliferation expressed in the Preamble. Only in such a way could the treaty be assured of the efficacy which was of primary concern for the Australian Cabinet in its Decision No. 165 of 29 April 1968.⁹¹

Acceding states would be legally committed to preventing the spread of nuclear weapons and supporting the development and implementation of diversion safeguards on peaceful nuclear activities. They would also be committed in the same way to sharing the technological benefits of nuclear explosives used in peaceful activities, and the benefits of peaceful nuclear energy. Furthermore, they would be undertaking commitments to encourage nuclear disarmament and cessation of the nuclear arms race, together with a reaffirmation of the United Nations Charter principles against the threat or use of force in international relations.⁹²

Although Australia had no direct influence over the final form of the Preamble, it could draw confidence, from the comprehensive nature of its text, that those states

⁹⁰ *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At pp. 174-180.

⁹¹ Cabinet Minute: Decision No. 165 (29 April 1968) [52]. [on-line]: Available WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_32.htm . At p.2.

⁹² It is notable that Secretary Rusk used the expression "limitations on the nuclear arms race", rather than the language of the treaty text in paragraph eight of the Preamble - "cessation of the nuclear arms race". The US Secretary of State was not prepared to report to the US Senate that the Johnson Administration intended to follow a strict interpretation of the eighth paragraph of the Preamble, nor the terms of Article VI on the disarmament obligations of the nuclear weapon states. *Supra*. At Note 90, p. 175.

which did eventually accede to the NPT would be committed to non-proliferation rights and obligations whose combined effect was to prevent the spread of nuclear weapons to states not already in possession of them.

- Articles I and II

The crucial question for Australia of the meaning of the term "manufacture" in Articles I and II was not dealt with in any expressly interpretative sense in Secretary Rusk's report. Rather, he merely noted the existence, in Article II, of an obligation by non-nuclear weapon states not to receive the transfer of nuclear explosive devices of any kind from any source whatsoever, and not to "manufacture or otherwise acquire" such weapons.⁹³ As it had previously demonstrated in the General Assembly First Committee debate, the United States Government was too wary of the possible consequences to spell out its interpretation of the meaning and operation of terms vital to the central proliferation question.

This omission had positive overtones for both sides of the Australian nuclear policy debate. The nuclear nationalists could still assert that the terms of Articles I and II left States Parties free to do all things towards the manufacture of nuclear weapons short of actually fabricating them.

On the other hand, Australian advocates of the treaty could point to America's carefully delineated position on the question of interpretation of the two articles, provided to Australia in its *Aide-Memoire* of 13 May⁹⁴. The acquisition of nuclear weapons, *per se*, would not be permitted, while the development of legitimate peaceful use technologies would not be hampered by a strict or explicit interpretation of what could and could not be attempted in the field of nuclear research.⁹⁵

⁹³ *Supra*. At pp. 175, 176.

⁹⁴ *Op. cit.* At Note 39.

⁹⁵ *Supra*. At Note 48.

- Articles III and IV

The safeguards provisions of Article III, the implications of which had caused great anxiety within the "bomb lobby" group in Australia, were addressed in greater detail in both Secretary Rusk's Report and Chairman Seaborg's testimony before the Senate Foreign Relations Committee.

Seaborg's discursive treatment of the origins and development of safeguards against the diversion of nuclear material from peaceful purposes to weapons manufacture is an authoritative and effective indicator of the views of a technically and politically literate exponent of American policy on this vital part of the NPT bargain. As far as Australia was concerned, his most significant points were his insistence on the efficient, effective and non-intrusive nature of IAEA safeguards arrangements, and their continuing development in that direction.⁹⁶ Seaborg was careful to point out that the United States considered fears held by some states (including Australia) that Agency inspections of nuclear facilities would compromise their commercial secrets to be groundless.⁹⁷

Seaborg based his assessment on the facts that inspectors were currently precluded from interfering in plant operations, and did not normally require access to commercially sensitive information. In any event, they were barred from transmitting any information gained to unauthorised parties and, crucially for Australia, could be rejected by a State Party to the treaty as unacceptable. This situation was not expected to change. Thus, the Australian Cabinet's insistence that the right to reject any IAEA inspector - such as individuals associated with Communist bloc states - be "established and asserted" had been accomplished.⁹⁸

On the question of costs for the administration of NPT safeguards, Seaborg again met the needs of the Australian Government by agreeing with its previously held position, to the extent that treaty implementation costs should be kept to a minimum. The overall cost effect of implementing the requirements of the treaty, Seaborg asserted, would not amount to more than a small fraction of the overall projected value of

⁹⁶ *Op cit.* At Note 7, pp. 5, 6.

⁹⁷ *Ibid.* At p. 5

⁹⁸ *Op. cit.* At Note 91, p. 2.

electricity generated in safeguarded nuclear power plants.⁹⁹ Since the US had not varied its view that assessment of a state's contribution to the total IAEA inspection budget should be in proportion to its assessed *pro rata* contribution to the general budget, Australia was assured of an equitable cost burden. The Russian view that each state should bear the costs associated with inspections of its own facilities, a concern for Australia in view of its potentially extensive uranium mining activities, had therefore been avoided.¹⁰⁰

One of Australia's most strongly expressed anxieties - felt especially by the Australian Atomic Energy Commission - had been the effect of adherence to the NPT on Australia's access to American nuclear technology. The specific concern was for the detrimental effect on the *Australia - U.S. Agreement for Cooperation concerning the Civil Uses of Atomic Energy*, renewed in early 1967, which the Commission feared could be abrogated or renounced as a result of Australia signing the new treaty.¹⁰¹

Chairman Seaborg stressed in his testimony that the obligations which the United States had previously undertaken in this regard (under its "Plowshare" programme) would be enhanced, not restricted, by its new obligations under the NPT (in Article IV (2)).¹⁰² Although Australia had thus been successful in important aspects of the interpretation of Article III, one significant omission from the testimony of both Rusk and Seaborg was the question of IAEA safeguards application to mining activities. Although this omission is probably attributable to the need to avoid such complexities before the Senate Hearings, it nevertheless provided some comfort to those in Australia (and especially senior officials at the AAEC) who continued to resist the treaty.

In many important ways, however, the concerns expressed in Cabinet Decision No. 165 over safeguards arrangement and access to nuclear information and technology had been met.

⁹⁹ *Op. cit.* At Note 7, p. 7.

¹⁰⁰ *Op. cit.* At Note 34, p. 16. [ATS 1957, No. 8; 238 UNTS 275; TIAS 5830].

¹⁰¹ Document A 1838/346: 719/10/6, Pt. 3 [169]. (no date). *Australian Atomic Energy Commission: treaty on the Non-Proliferation of Nuclear Weapons: Article III - Safeguard: Implications for Australia*. Classified Top Secret. Canberra: Australian Archives. At pp. 4, 5. [ATS 1957, No. 8; 238 UNTS 275; TIAS 5830].

¹⁰² *Op. cit.* At Note 7, p. 9.

Conclusion

In his message transmitting the NPT to the United States Senate on 9 July 1968, President Johnson stated:

By 1985 the world's peaceful nuclear power stations will probably be turning out by-product plutonium for the production of tens of nuclear bombs every day. This capability must not be allowed to result in the further spread of nuclear weapons. The consequences would be nuclear anarchy, and the energy designed to light the world would plunge it into darkness.¹⁰³

Although Australia's conservative political leaders, its diplomats, nuclear bureaucrats and uranium miners could not, in the end, deny that a comprehensive and effective nuclear non-proliferation treaty was firmly in Australia's national interest, one of America's principal Pacific allies had been drawn only reluctantly towards the conclusion that the NPT was sufficiently strong to protect its national security. Armed with mutual security assurances expressed within the terms of the ANZUS Treaty between itself, New Zealand and the United States, and with access to US nuclear technology for the peaceful applications of nuclear energy, Australia's reluctance to rely on the long-term durability of its most important alliance relationship is perhaps difficult to understand.

It must, however, be assessed in the context of the fierce internal debate between those individuals and institutions, on both sides of the question, whose antipathy generated much of the nuclear policy ambivalence which appears to have so perplexed America's nuclear negotiators. At the centre of the storm, and often playing a carefully balanced policy game against its interlocutors, stood the diplomats of the Department of External Affairs, whose purpose was diplomacy, rather than preparations for warfare. Although they had, to some extent, stepped back from the centre of Australia's nuclear advocacy with the removal of the NPT debate to the UN General Assembly in New York, DEA's senior nuclear thinkers had cause to be well pleased with their efforts.

Australia finally signed the NPT on 27 February 1970, shortly before it entered into force. Although twenty months passed before Australia was ready to acknowledge the inevitability of its inclusion within the NPT regime,¹⁰⁴ its insistence on certainty of

¹⁰³ *Op. cit.* At Note 90, p. 182.

¹⁰⁴ Document A 1838/346: TS 919/10/5 [130]. (27 February 1970). *Department of External Affairs News Release No. M/15*. Canberra: Australian Archives.

interpretation on many aspects of this most important of global bargains gave it a point of departure for much of its future nuclear policy activism. Embedded in that process is a range of implications for the evolution of nuclear international law which will be addressed in the following chapter.

CHAPTER SIX

INTERNATIONAL LAW: THE LIMITS OF INFLUENCE

Introduction

Much of Australia's achievement in gaining the attention of the United States over its objection to the NPT had occurred as a result of a three-fold advantage. First, the Johnson Administration was concerned about the possible consequences of allowing the new treaty to lapse through widespread disagreement over detail. As a result, it had shown its willingness to concede ground over the treaty's terms, as the price of eventual success. Furthermore, the United States Government was convinced that the treaty was unlikely to be effective without the full support of all member states of the Western Alliance, rather than merely the member states of the North Atlantic Treaty Organisation.¹ Finally, Washington regarded prompt conclusion of the negotiations on the treaty as necessary to forestall the danger of its rejection by non-nuclear weapon states at the projected Conference of Non-Nuclear States, to be held in March or April 1968.²

For these reasons, as this study has shown, the United States made determined efforts to convince Australia of the treaty's value as a new, effective and durable international legal barrier against the spread of nuclear weapons. Although only

¹ It would not, of course, be fully effective until it approached near-universal adherence. Even so, the US view that the NPT needed the comprehensive support of the Western Alliance probably had its genesis in 1963 at initial US/Soviet talks on a non-proliferation treaty, held in Moscow between US Ambassador Averell Harriman and Soviet Prime Minister Nikita Khrushchev on 25 July of that year.

On the American side, the notion of a non-proliferation treaty then included a vision of the two superpowers each enforcing a non-proliferation *fiat* in their respective spheres of influence. President Kennedy envisioned a non-proliferation *quid pro quo* with the Soviet Union, based on the ability of each superpower effectively to halt the spread of nuclear weapons into the hands of their respective allied (if not non-aligned) states. Kostrzewa-Zorbas, G. (1998). *American responses to the proliferation of actual, virtual and potential nuclear weapons: France, Israel, Japan, and related cases, 1939 - 1997: Lessons for the multipolar future*. Doctoral dissertation, Johns Hopkins University. *Dissertation Abstracts International* 59/05, 1765. At pp. 189, 190.

² In the event, the Conference was postponed, and was eventually held after the conclusion of the UN General Assembly debate, from 29 August to 28 September 1968 in Geneva. Its main purposes were to address the problems involved in the implementation of the NPT, to discuss measures to ensure the security of the non-nuclear states and prevent further proliferation, and, finally, to discuss co-operation in the field of peaceful uses of nuclear energy. Australia attended the Conference. Cabinet Submission No. 278, 13 August 1968 by Minister for External Affairs Paul Hasluck. Available WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_278_1.htm. At p. 1 and Annexe 2.

partially effective in that endeavour, America's response to Australia's objections to its terms was strong evidence of the ability of its middle-power allies to bring influence to bear on US interpretation of important multilateral conventional disarmament law.

As discussed in Chapter Five, several states with nuclear interests or capabilities (including America's closest ally, the United Kingdom) had noted Australia's achievement during the United Nations General Assembly debate on the treaty. Among them were the member states of the European Atomic Energy Community (Euratom) and the North Atlantic Treaty Organisation, as well as Japan and South Africa, each of which had received the text of the US *Aide-Memoire* of 13 May 1968 to Australia on issues of treaty interpretation.³

Although Australia was now coming under broad international notice through its negotiations with the United States, it had already engaged several nuclear-capable states, namely Italy, Sweden, Canada and the Federal Republic of Germany, in bilateral discussions on the content, purpose, and chances of success for the NPT.⁴ In addition, Australia maintained similarly focused bilateral diplomatic contacts with the treaty's second and third Depository States, the United Kingdom and the Soviet Union.

In this way, Australia kept open a second avenue of diplomatic consultations aimed at building a picture of the extent of global support for the new treaty. By not relying solely on the US/Australia relationship to mediate its position on the NPT with the rest of the world, Australia ensured for itself an independent means of assessing the probable strength and durability of the treaty. Such an assessment, as the Gorton Government had always insisted, would be a fundamental component of any decision whether Australia would sign (and subsequently ratify) the NPT.⁵ That process also had

³ See Chapter Five. The six member states of Euratom in 1968 were Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands. The sixteen NATO member states comprised Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom and the United States.

⁴ Evidence in support of this claim will be presented in the form of a summary of cable reports from Australian diplomatic posts around the world to the Department of External Affairs, Canberra, detailing the responses of states to Australia's concerns over the NPT. It will also be taken from reports of diplomatic consultations made to DEA by the Australian Mission to the United Nations in New York.

⁵ One example of its position is contained in Cabinet Decision 95 of 26 March 1968. Paragraph 3 states, in part:

... Australia should not take an attitude towards signing without a complete examination of national interests, including such aspects as our military defence and industrial interests. Indeed, the Cabinet was inclined very much to doubt whether it would prove possible to institute the Treaty, and if instituted, unless it were very widely signed, whether it would

the secondary effect of reinforcing with important non-nuclear weapon states their perception of Australia's increasingly independent engagement in global nuclear affairs.

This chapter will examine the degree to which Australia was able to bring influence to bear on the legal interpretations attributed to the text of the NPT by relevant states *other than* the United States. Such a discussion is essential to any determination of Australia's ability, finally, to claim for itself a substantial role in the formation of the shape and strength of contemporary nuclear international law. By establishing the full extent of Australia's ability to modify the responses of nuclear-interested and capable states to the legal challenges posed by the NPT, the chapter will describe the origin of Australia's transformation from a nuclear adjunct of the US, into an overt and creative anti-nuclear activist within the context of the Western Alliance.

In fact, clear and convincing evidence in the Australian public record of Australia's ability to guide or affect the response of states other than the United States of America is limited to two other nuclear-capable states - the Federal Republic of Germany and Canada. Some evidence of a similar nature exists in respect of two declared nuclear weapon states - the United Kingdom and the Soviet Union. However, there is less evidence of the nature and effects of more peripheral diplomacy concerning the NPT between Australia and Italy, Sweden and South Africa, also nuclear-capable states.

The chapter begins by analysing the response of nuclear-capable states Canada and the Federal Republic of Germany to Australian bilateral diplomacy in the period from 21 February 1967⁶ to 14 March 1968, during the latter stages of the NPT negotiations held at the Eighteen Nation Disarmament Committee in Geneva. Similar analysis will focus on the second and third declared nuclear weapon member states of the ENDC - the United Kingdom and the Soviet Union. The recorded international legal positions of these members of the ENDC during the Geneva negotiations will be contrasted, where possible, with their final stance in the resumed session of the Twenty

ward off proliferation.

Cabinet Minute, Canberra, 26 March 1986. Decision No. 95 [on-line]. Available WWW: http://www.naa.au/COLLECT/cabpapers/Cabinet68/images/Decision_95_18.htm

⁶ This date has been identified as a suitable starting point because it is the re-convention date of the ENDC early in 1967, and is the first point at which direct correlation is possible between the positions of member states, developed in open forum at the ENDC, and available evidence of bilateral diplomacy between those states and Australia. On 14 March 1968, the report of the ENDC on the NPT negotiations was referred to the UN General Assembly and Disarmament Commission. ENDC/225; 14 March 1968.

Second UN General Assembly First Committee debate, held from 24 April to 12 June 1968. Assessments will then be made of the effect of Australian diplomacy on their modified positions. In addition, the value of Australia's informal discussions with representatives of the governments of Italy, Sweden and South Africa will be assessed alongside similar discussions held with the International Atomic Energy Agency at Vienna.

To these assessments will be added the imputable legal effect of the dissemination of US responses to Australia in its *Aide-Memoire* discussed above. The result will be a comprehensive evaluation of Australia's ability, in an international legal sense, to modify or help develop multilateral interpretations of the terms of the NPT, in order to clarify the treaty's intentions, enhance its effectiveness, ensure its survival and allow it to evolve to meet future needs.

There is no doubt that the success of this seminally important multilateral arms control instrument in restricting the spread of nuclear weapons placed under global scrutiny two of the foremost challenges of international law: the legitimisation of principles of law in the political decisions of a diverse community of states, and the enforcement of universal rules of state conduct in the absence of a sovereign authority or supranational enforcement mechanism.⁷

Through the advent of the treaty, Australia had been required to develop, declare, and then, in the open forum of the United Nations General Assembly, adhere to a national policy on the acquisition of nuclear weapons. Having done so - and thereby essentially abandoned its lingering aspirations for an independent nuclear deterrent - Australia could now build on its increasingly acknowledged middle-power status (which it had already demonstrated at the United Nations in New York) through active involvement in both the legal and political dimensions of global anti-proliferation efforts.

Australia had been an influential member state, with a "designated seat", on the Board of Governors of the International Atomic Energy Agency since its inception in 1957. It would now prepare to go well beyond that vital but limited role in the thirty years following the opening of the NPT for signature. It is no coincidence that Australia's international anti-nuclear journey parallels, on a far wider scale, the

⁷ Ratner, S. (1998). International law: The trials of global norms. *Foreign Policy*, 110, pp. 65-80.

evolution of its domestic nuclear policy from ambivalence and scepticism to consolidation and coherence.

Australia and the Development of International Nuclear Non-Proliferation Law

The ability of economically advanced states, with broad scientific, technical and industrial resources, to develop or acquire nuclear technology for energy production was matched, in 1968, by the growing interest of some in the possibility of using their accelerating energy requirements as a means of obtaining nuclear weapons.⁸ The extent of that interest can be gauged by reference to a contemporaneous list of potential nuclear weapon states, compiled by Fischer in 1971. It is divided between those states which were then able to acquire nuclear weapons in the short to medium term, following an acquisition decision, and those states for which nuclear acquisition would be a feasible, if longer term, prospect.

Taken from the testimony of the United States Atomic Energy Commission during the NPT ratification hearings before the US Senate Committee on Foreign Relations in July, 1968, it is reproduced below as Table 1.

⁸ For a comprehensive analysis of the United States' policy on nuclear proliferation (from 1961 onwards) and its characterisation as "the 'nth' country problem" during the Kennedy Administration, see: Maddock, S. J. (1997). The nth country conundrum: The American and Soviet quest for nuclear nonproliferation, 1945 - 1970. Doctoral dissertation, University of Connecticut. *Dissertation Abstracts International* 58 - 06A, 2362. At Chapter VIII: Fits and starts: JFK, the test ban, and the nth country problem, 1961-1962.

Table 1

Potential Nuclear Weapon States: 1968⁹

Acquisition in 5 to 10 Years	Acquisition after more than 10 Years	
Australia	Argentina	Netherlands
Canada*	Austria	Pakistan
Federal Republic of Germany*	Belgium	Poland*
India*	Brazil*	South Africa
Italy*	Chile	Spain*
Japan	Czechoslovakia	Switzerland
Sweden*	Hungary	U.A.R.*
	Israel	Yugoslavia

* Denotes a member state of the ENDC.

| United Arab Republic (Arab Republic of Egypt after 2 September 1971).

As indicated above, eight of these so-called "threshold states"¹⁰ were present in the Eighteen Nation Disarmament Committee (ENDC) during the four year negotiation effort in Geneva aimed at concluding a non-proliferation treaty.

Held in six separate sessions between 21 January 1964 and 14 March 1968, when the Committee referred the Draft NPT to the United Nations General Assembly

⁹ *Hearings before the Committee on Foreign Relations*, US Senate, 10, 11, 12 and 17 July 1968, p.31. Cited in: Fischer, G. (1971). *The non-proliferation of nuclear weapons* (D. Willey, Trans.). London: Europa. At p. 27

¹⁰ The term "threshold states" is used widely to denote those states with both the motivation and capacity to develop or otherwise acquire nuclear weapons in the short or medium terms. It does not, however, distinguish between states in terms of the level of their motivation, nor their temporal distance from acquisition, following a decision to acquire nuclear explosives. See, for example: Joint Committee of the Parliament of the Commonwealth of Australia on Foreign Affairs and Defence. (1986). *Disarmament and arms control in the nuclear age*. Canberra: AGPS. At Chapter 5, pp. 116 - 150.

for debate, the negotiations revealed the attitudes of a number of nuclear threshold states to the legal, political and technical aspects of the treaty.¹¹

Table 2 lists the member states of the ENDC, divided between Western Alliance, Soviet-influenced and Non-Aligned states.

Table 2

Member States of the Eighteen Nation Disarmament Committee: 1968¹²

Western Alliance	Soviet-Influenced	Non-Aligned
United States	Soviet Union	India*
United Kingdom	Poland*	Sweden*
Canada*	Bulgaria	Brazil*
Federal Republic of Germany	Romania	Mexico
Italy*		Nigeria
Spain*		Ethiopia
		Burma
		U.A.R.*

* Denotes a "threshold" nuclear weapon state in 1968.

Among the Committee's members were states with which Australia developed a diplomatic dialogue during 1967 and 1968 on the legal, political and technical aspects of nuclear anti-proliferation. Among these, in turn, were some states which made pronouncements, initially during the ENDC negotiating process and later in the UN General Assembly First Committee debate, on issues raised by the terms of the new treaty. The record of those statements provides a starting point for consideration of the

¹¹ *International negotiations on the Treaty on the Nonproliferation of Nuclear Weapons*. (1969). Washington, DC: United States Arms Control and Disarmament Agency. At pp. 9, 115.

¹² *Ibid.*

degree to which any of them accepted or rejected Australia's assertions and concerns over the treaty's legal and other deficiencies, potential effectiveness and prospects for completion.

For example, how strictly or liberally could the term "manufacture" (of nuclear devices) in Articles I and II be interpreted? Would a state's obligations under its prospective Safeguards Agreement with the IAEA be subject to unilateral change without consultation? Could a state reject individual IAEA inspectors, and would uranium mining activities be exempt from safeguards inspection requirements? The following survey is aimed at establishing broad conclusions on these and other questions of concern to the Gorton Government over the terms of the NPT, and on which it sought selective, though global, consultation.

Australia's Bilateral Negotiations

The United Kingdom

As America's closest ally, a member state of the ENDC, a permanent member - with veto power - in the United Nations Security Council, a declared nuclear weapon state under the terms of Article IX (3) of the NPT and a Depository State for the NPT, the United Kingdom's preferred treaty interpretations are important from a global perspective, especially to the extent that they differed from those of the United States. Any divergence of views between Australia's two major Western allies over the meanings to be attributed to such important multilateral nuclear international law was (and remains) capable of destabilising the growing international consensus that the NPT must be both practical and effective in its application.

The effect of a failure to attract broad global support for the treaty or its aims on nuclear proliferation was incalculable, and therefore - given the increasing incidence and depth of nuclear technical capability among threshold states during its negotiation - potentially extremely dangerous. To that extent, any influence demonstrated by Australia over the United Kingdom's interpretations of the treaty text was, at least potentially, globally significant.

In fact, the United Kingdom exhibited some degree of independence from its superpower ally by keeping Australia confidentially apprised, from at least early 1967,

of progress being made at Geneva in private discussions between the US and the Soviet Union, and being reported to it and the other NATO states by the United States. Furthermore, it did so on the understanding that the US should not learn of this.¹³ Nevertheless, as befitted its senior standing within the Western Alliance, Britain's adherence to American interpretations of the substantive Articles of the draft treaty text was essentially complete. The United Kingdom had demonstrated that position from a relatively early date.

On 21 March 1967, for example, the UK representative at the ENDC, Lord Chalfont, had lent strong support to US assertions that the existing system of safeguards against diversion of nuclear material to weapons production could be easily modified to accommodate the broader requirements of the NPT.¹⁴ Nevertheless, during the latter stages of the UN General Assembly First Committee debate, the UK Delegation, having been given a copy of the United States' *Aide-Memoire* to Australia of 13 May 1968,¹⁵ sought Australia's reactions to the Note, and asked whether it would be seeking similar interpretations from them.¹⁶

Notwithstanding the fact that the Australian and United Kingdom Delegations had consulted over the same points as had the Australian and US Delegations during the First Committee debate at New York, the UK Delegation's consternation stemmed from the fact that it appeared to have no brief from its government on the line to be taken on contentious aspects of the treaty, such as an acceptable interpretation of the word "manufacture" in Articles I and II. However, the British Delegation did consult immediately with the British Minister of State for Foreign Affairs and Minister for

¹³ For example, on 3 April 1967 the Australian High Commission in London received a copy of the latest US Draft NPT text, derived from US/Soviet negotiations at Geneva, and being currently circulated to NATO states, on an informal and confidential basis. The Atomic Energy and Disarmament Department of the UK Foreign Office stressed that "the Americans should not learn that [the UK] had supplied the text to Australia." Document A 1838/275: 719/10/6, Pt. 1 [85]. (14 April 1967). Canberra: Australian Archives.

¹⁴ *Supra*. At Note 11, p. 71. One observer of the NPT negotiating process at Geneva noted, in 1973, that the United Kingdom appeared determined to behave in exactly the same way as the United States and the Soviet Union, on the assumption that its status as a nuclear-weapon state required it to do so. He added that ".... if anything, British statements in favour of the treaty in Geneva were more doctrinaire than those of the two superpowers." Quester, G. (1973). *The politics of nuclear proliferation*. Baltimore: Johns Hopkins University Press. At pp. 151, 152, 153-159.

¹⁵ At Chapter Five, Note 39.

¹⁶ Inward Cablegram UN. 808. Australian Mission to the United Nations, New York. Document A 1838/346: TS 919/10/5, Pt. 10. [111]. (14 May 1968). Canberra: Australian Archives.

Disarmament (Mr. Fred Mulley, then in New York for the First Committee debate). It then confirmed to the Australians that the United Kingdom was indeed unwilling to give assurances in public on the question of the meaning of the term "manufacture" in Articles I and II. It was not up to the British, they maintained, to "open up the treaty for discussion again".¹⁷ It may be presumed, in the absence of an alternative explanation, that this lack of clear interpretative policy direction was due, at least in part, to the fact that the UK Government saw no need to diverge in any significant way from the views of its superpower ally.

As the government of a declared nuclear weapon state, a strategic nuclear partner of the United States, a permanent member of the UN Security Council, and a Depository State for the NPT, the Wilson Government's position is not surprising. As far as the interpretation of the terms of the treaty are concerned, it had little choice but to acquiesce in America's strongly stated positions (on, for example, the voluntary acceptance by the US and Britain of IAEA safeguards over civil nuclear installations).¹⁸

The effect on the British position of Australia's bilateral discussions with them (such as they were) over the terms of the final NPT draft text is evident from the statement by UK Minister for Disarmament Mulley in the General Assembly debate.¹⁹ It was barely discernible. Mulley's only direct reference to Australia's concerns - on the question of the application of safeguards to "source materials" (Australia's mined, milled and exported natural uranium in oxide concentrate form) follow the US line in implying that IAEA safeguards were unlikely to be applied to the mining, milling and initial processing of natural uranium ores.²⁰ This is the only example of direct concurrence by the UK with the United States on matters of interpretative concern to Australia.

¹⁷ *Ibid.* Document A 5882/2: CO. 32, Pt. 2 [53] (2 May 1968). Canberra: Australian Archives.

¹⁸ Article III of the NPT does not require the five declared nuclear weapon states to submit their civil nuclear installations to IAEA safeguards against nuclear materials diversion. Nevertheless, both the US and the UK eventually agreed to do so as a mark of goodwill, and to encourage the widest possible adherence to the treaty. This decision, made as early as April 1967, was immediately conveyed to Australia, India and Canada by the British Government. Inward Cablegram 4725. Australian High Commission, London. Document A 1838/275: 719/10/6, Pt. 1 [86]. (21 April 1967). Canberra: Australian Archives.

¹⁹ Inward Cablegram UN.908. Australian Mission to the United Nations, New York. Document A 1838/346: 719/10/6, Pt. 5 [145]. (28 May 1968). Canberra: Australian Archives.

²⁰ *Ibid.* At pp. 3, 4.

In summary, Australia exerted no meaningful influence or guidance over the national policy of the United Kingdom in an arena which defined the basis of Britain's strategic security and fundamental alliance relationships. The record of Australia's diplomatic contacts with the United Kingdom on the new treaty is unsurprisingly devoid of either.

The Soviet Union

It may have seemed unlikely, to an independent observer, that the Soviet Union would be willing to accommodate, or even acknowledge, any concerns which a resistant Australia might exhibit towards the NPT. Nevertheless, the Soviet Union's eagerness to have the treaty commended by the General Assembly did lead it to hold out to Australia some hope of such an outcome.

The leader of the Soviet delegation at the ENDC, Ambassador Roshchin, had been active at Geneva during 1967 and early 1968 in all aspects of the treaty's evolving text, both in private bilateral consultations with the United States and in open forum Committee discussions. Furthermore, the Soviet representative had been a strong supporter of many aspects of the treaty which touched on concerns expressed by the Australian Government in its Cabinet Decision No. 165 of 29 April 1968.²¹ The strength of his support for the principles of non-proliferation which were embedded in the treaty (especially in its crucial Articles I and II) leave no room for doubt about the Soviet Union's genuine and urgent desire to see the treaty brought to an immediate and successful conclusion.

To this end, Ambassador Roshchin, from early 1967, expressed a clear Soviet view that the treaty would not prevent non-nuclear states from using nuclear energy for peaceful purposes, nor from obtaining the benefits of internationally supervised

²¹ This Cabinet Decision focused on the general instructions and brief to be furnished to the Australian Delegation to the United Nations General Assembly, for use in the General Assembly First Committee debate on the terms of the Draft NPT. Cabinet Minute, Canberra, 29 April 1968. Decision No. 165 [online]. Available WWW:

http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Submission_69_32.htm.

Cabinet Decision No. 165 was made in response to Cabinet Submission No. 69 of 26 April 1968, which comprised a Report of the Defence Committee (which had been augmented by the Permanent Secretaries of the Departments of National Development, Supply, and Trade and Industry, together with Sir Philip Baxter, Chairman of the Australian Atomic Energy Commission). It canvassed only those issues of concern for the brief to be given to the Australian Delegation at the UN General Assembly in New York for use in the First Committee debate on the Draft NPT. Cabinet Submission No. 69, 26 April 1968 [online]. Available WWW: http://www.naa.gov.au/COLLECT/cabpaper68/images/Submission_69-1.htm.

peaceful nuclear explosions (the subjects of Articles IV and V respectively).²² Furthermore, the Soviet Ambassador was adamant, during the final ENDC negotiating phase, that the safeguards arrangement against diversion of nuclear material, proposed in Article III, would not in any way hinder the development of peaceful nuclear applications by non-nuclear weapon states. In addition, he claimed, safeguards inspection activities (by the IAEA) would not become an "interference" in the internal affairs of states.²³

In more general terms, Ambassador Roshchin stressed that there were no loopholes in the treaty's terms. Since the Soviet Union would abide strictly by the terms of Article I (and thus not allow any transfer of its nuclear weapons or technology whatsoever), supporters of the NPT could be assured, he implied, of its efficacy.²⁴ Roshchin also noted there that none of the twenty-seven states then subject to IAEA nuclear materials diversion safeguards had complained about "any obstacles" to their development of peaceful nuclear applications.

Each of these aspects of the NPT had been the subject of concern expressed in Cabinet Submission No. 69, which comprised the Report of the augmented Defence Committee, and had been endorsed by Cabinet in its Decision No. 165.²⁵ In view of the tenor of Soviet support for the Draft treaty text, its underlying principles, and issues of specific concern to Australia, the "surprise and disappointment", expressed in those terms by the Soviet Union at Australia's statement of 17 May in the First Committee debate, appears genuine.²⁶

²² *Supra*. At Note 11, pp. 67, 83.

²³ *Ibid*. At p. 102. The final negotiating phase was completed at the Thirteenth Session of the ENDC from 18 January 1968 to 14 March 1968 (the final negotiating session to consider the terms of the Draft NPT).

²⁴ *Ibid*. At p. 105.

²⁵ *Supra*. At Note 21.

²⁶ *Report to Cabinet, Draft Treaty on the Non-Proliferation of Nuclear Weapons: Summary of developments on 28 - 29 May*. Document A 5882/2: CO32, Pt. 2 [53]. Canberra: Australian Archives. At p. 4.

The full text of the statement to the General Assembly First Committee by Australian Ambassador Shaw is contained in: *Draft Treaty on the Non-Proliferation of Nuclear Weapons (1968)*. *Current Notes on International Affairs*, 39 (5), pp. 206-210.

During subsequent private consultations at New York,²⁷ Ambassador Roshchin sought Australia's support for the treaty, and its co-sponsorship of the revised First Committee resolution of 28 May 1968. That resolution had strengthened the treaty's preamble by emphasising the importance of co-operation in peaceful nuclear activities, the right of Parties to engage in those activities, and the need to follow up the treaty with nuclear disarmament measures.²⁸

In reply, the Australian Delegation observed that one of the factors influencing a decision on Australian ratification of the treaty would be the Soviet attitude towards a safeguards agreement with the IAEA covering its own civil nuclear programme. Others included commercial concerns stemming from potential restrictions on uranium exports to non-NPT states, and on peaceful nuclear research and development.

Having received a rebuff in his efforts to enlist Australia's support for the treaty, Ambassador Roshchin stated that his country and the United States were considering submitting to the First Committee "amendments" to the draft treaty text of Articles IV and V, in order to make them more acceptable to states generally.²⁹ While this was, at first sight, a promising development for Australia in that there appeared to be some unexpected scope for bilateral influence with the Soviet Union, reality returned the same day. Through its representative, De Palma, the US confirmed its discussion with the Soviet Union over Articles IV and V, but described any changes as "cosmetic". They would have no bearing on Australia's fundamental concerns.³⁰

The United States' characterisation of the amendments proved substantially correct. The amended (and final) draft treaty text which emerged from these last-minute US/Soviet negotiations on 31 May 1968 merely added a preambular exhortation on "effective measures in the direction of nuclear disarmament", while amending Article IV to acknowledge both the right of Parties to acquire nuclear materials and equipment for peaceful purposes, and the energy needs of developing areas of the world.³¹ Finally,

²⁷ These consultations were held between Ambassador Roshchin and members of the Australian Mission in New York. Inward Cablegram UN 910 (29 May 1968). Document A 1838/346: 719/10/6, Pt. 5 [144]. Canberra: Australian Archives.

²⁸ *Supra.* At Note 11, p. 122.

²⁹ *Supra.* At Note 27, pp. 2, 3.

³⁰ *Loc. cit.* At Note 11, pp. 123, 124.

³¹ *Ibid.*

Article V was amended merely to allow for explicit international supervision of the provision of a peaceful nuclear explosive service to the non-nuclear weapon states.³²

Thus, Soviet efforts to achieve full and immediate Australian support for the treaty in the General Assembly were essentially disingenuous, comprising little beyond insubstantial promises of amendment proposals and diplomatic blandishments.

In the end, therefore, Australia could not point to significant matters of legal interpretation of the terms of the NPT over which it had exerted any meaningful bilateral influence with the Soviet Union. In contrast to the United States, the Soviet Union would brook little or no interpolation by Western allies such as Australia in what it believed to be a universally supportable non-proliferation treaty.

Though it had as much to lose as the US if the NPT itself was lost, Moscow had nevertheless drawn a line beyond which it would not step, thereby showing itself unwilling to demonstrate any flexibility in pursuit of a goal as important as the NPT.³³

Canada

The primary focus of Australia's consultations with Canada over the terms of the NPT was on the question of safeguards against diversion of nuclear material from peaceful to military applications. The most important consideration for both Canada and Australia was whether the safeguards arrangement, to be administered by the International Atomic Energy Agency under the terms of Article III, would be applied to the mining, milling and processing of natural uranium ores.

Canada, a major world producer and exporter of both natural uranium-based nuclear power generation technology, and of uranium itself, was concerned to ensure that its uranium mining industry would not be subject to IAEA safeguards

³² *Ibid.*

³³ In a discursive survey of Soviet attitudes towards the NPT, Australian Ambassador to the Soviet Union Rowland observed in February 1968 that the Soviet Union regarded the uncontrolled spread of nuclear capability as dangerous " simply because it would introduce more threats to peace". Having estimated that twelve states could, in 1968, construct nuclear explosive devices, the Soviet Union would, in Ambassador Rowland's opinion, " make a serious attempt to secure the widest possible membership of an effective treaty and may, if they have to, *pay some price to secure it.*" (emphasis added) As noted earlier, that "price" appears to have been relatively low. Inward Cablegram 77 from the Australian Embassy, Moscow (9 February 1968). Document A 1838/275: 719/10/6, Pt. 2 [100]. Canberra: Australian Archives.

inspections.³⁴ That had been the case in the years before the advent of the NPT, although there appeared to be no assurance from the treaty text itself, nor from the safeguards provisions of the Statute of the IAEA, that the implementation of the new treaty would maintain that position.

Canada found an enthusiastic supporter in Australia, which had begun to experience a resurgence of activity in its own uranium mining industry. The revival had begun when Minister for National Development David Fairbairn announced in early 1967 that henceforth the level of uranium exports would be determined by reference to the stock of proven reserves, rather than be restricted purely through government *fiat*.³⁵ The change of policy meant that uranium mining companies could now exercise a right to export a certain percentage of the processed uranium ores they produced.³⁶ The result had been an immediate boom in uranium mining activity in Australia, in which large investments of foreign capital had seen more than sixty companies engaged in exploration for uranium deposits by 30 June 1970.³⁷

With a potentially lucrative renaissance of its uranium export industry, and no near-term domestic energy generating applications (apart from the planned but ill-fated Jervis Bay nuclear power generating plant) it is not surprising that Australia saw its national interests as threatened by the expense, disruption and possible commercial risks associated with IAEA safeguards inspection arrangements imposed at the initial mining stages.³⁸

³⁴ The Canadian CANDU nuclear power generation technology uses natural (i.e. non-enriched) uranium oxide (UO₂), with pressurised heavy water cooling. Titterton, E.W. (1979). The case for. In E.W. Titterton & F. P. Rowbottom, *Uranium: Energy source for the future?* (p. 1 *et seq.*). West Melbourne: Abacus. At p. 35.

³⁵ Carr, M. (1979). *Australia and the nuclear question. A survey of government attitudes, 1945 - 1975*. Unpublished Masters thesis, University of New South Wales, Sydney, New South Wales. At pp. 179, 180. The wide powers of the responsible Commonwealth Minister of the Crown in respect of the control of nuclear materials are set down in Part III, Sections 34 to 43 of the *Atomic Energy Act 1953-1973* (Cth).

³⁶ *Ibid.*

³⁷ *Supra*. At Note 35. Economically recoverable reserves of U₃O₈ rapidly increased by more than 25,000 short tons, primarily in new deposits found at Narbarlek, Ranger and Koongarra, NT, and Lake Frome, SA. At p. 181.

³⁸ *Op. cit.* At Note 21, pp. 10-13. The Defence Committee Cabinet Submission No. 69 of 26 April 1968 canvassed the possibility that Australia may refuse to sign the NPT if its concerns over industrial espionage, cost burdens and disruption of production were not met.

On these issues, Australia echoed Canada's own anxieties over the possibility of having to extend its safeguards obligations to the mining process. During the 1967 and 1968 NPT negotiating sessions in the ENDC, Canada had not seen fit to address the issue of safeguards on uranium mining activities, due possibly to a lack of support in the Geneva Committee, combined with the dominant role there of its southern neighbour and ally.³⁹

However, as the ENDC negotiations drew to a close, Canada sought urgent consultations with Australia, a fellow major uranium producer, on the question of safeguards on mining operations under the terms of Article III.⁴⁰ Australia's concurrence on the question of exemption of mining activities from an NPT safeguards regime, expressed in a diplomatically forceful way by Ambassador Patrick Shaw in his statement on 17 May in the First Committee debate, may well have encouraged Canada to address the question in its own intervention one week later.⁴¹ Ambassador Shaw had stated:

As things stand, taking account not merely of the impediment to industrial activity that would flow, the Australian Government would find much difficulty if safeguards were to be applied to legitimate *bona fide* activities in the mining and early processing stages.⁴²

In contrast to Australia's position, however, Canada took a negative line in the debate. It merely noted, in its own intervention, that there had been no discussions in the IAEA to the effect that uranium ores or unrefined ore concentrates should be

³⁹ *Op. cit.* At Note 11, pp. 70-73; 101-103. During the Thirteenth (and final) ENDC Session on the NPT, from 18 January to 14 March 1968, Canada's representative, General Burns, had confined his remarks on the application of safeguards to their discriminatory nature. At p. 101.

The second conclusion is supported by a report from Ambassador Shaw at the UN in New York in which he noted Canada's professed lack of concern over mining safeguards, on the basis that they were "specifically excluded from NATO understandings to which the USSR has not objected". Inward Cablegram UN 762, Australian Mission to the United Nations, New York. Document A 1838/346: 719/10/6, Pt. 5 [140]. Classified Top Secret. Canberra: Australian Archives. At p. 3.

⁴⁰ Inward Cablegram 169, Australian High Commission, Ottawa (8 March 1968). Document A 1838/346: 719/10/6, Pt. 3 [170]. Canberra: Australian Archives.

⁴¹ Inward Cablegram UN. 873, Australian Mission to the United Nations, New York (23 May 1968). Document A 1838/346: 719/10/6, Pt. 5 [148]. Canberra: Australian Archives.

⁴² *Op. cit.* At Note 26.

subject to safeguards. Canada saw no reason why Article III of the NPT should alter this situation.⁴³

Since Australia shared Canada's concern over the implications of allowing uranium mining operations to be brought under an NPT inspection regime, it was natural that common concerns should create a complementary legal approach to the question, in which the efforts of two major suppliers on the world uranium market were aimed at ensuring the exemption of uranium mining from IAEA safeguards inspections. From a legal perspective, the question concerned the application of the terms of the Statute of the IAEA and the Agency's safeguards system.

NPT Article III (1) requires non-nuclear weapon states, *inter alia*, to submit to safeguards procedures in respect of all "source or special fissionable material". Those safeguards procedures are to be set forth in an agreement concluded between each non-nuclear weapon State Party to the treaty, and pursuant to the Agency's Statute and safeguards system.⁴⁴

As discussed in Chapter Five in respect of Australia's negotiations with the United States, Article XX (1) of the Agency's Statute defines "special fissionable material" as including material containing plutonium-239, uranium-233 and uranium enriched in its isotopes 235 or 233, thus excluding natural uranium ores in any form.⁴⁵ However, Article XX (3), defines "source material" as:

.... uranium containing the mixture of isotopes *occurring in nature* ... in the form of metal, alloy, chemical compound, or *concentrate*; (emphases added).⁴⁶

It can be argued, therefore, that on a literal interpretation of Article XX, both Australia's and Canada's assertion of the exemption of mining activities from safeguards was on unsafe legal ground, since they both exported natural uranium in a concentrate form. Nevertheless, as both countries knew, that legal mandate had not been enforced. As Canada argued, no valid reason existed for it to be implemented in respect of the NPT.

From Australia's point of view, its fear of significant burdens on its uranium mining industry, while still justifiable, had been alleviated by the complementary legal

⁴³ *Supra*. At Note 41.

⁴⁴ See Appendices II and III.

⁴⁵ *Statute of the International Atomic Energy Agency* (1957). [A.T.S. 1957 No. 11]. See Appendix III

⁴⁶ *Ibid*.

views of itself and its competitor.⁴⁷ By simultaneously presenting a clear and strong position to the rest of the world on a matter which, not having been expressly addressed, remained undecided, Australia and Canada together exerted considerable pressure to ensure that their own interpretation of Article III prevailed.

In effect, they had sought the overruling of a *de jure* obligation to accept safeguards through a *de facto* acceptance of the opposite conclusion. Australia's diplomatic activity in this respect had played its part in securing, under the terms of Article III of the NPT, a formerly insecure assumption about the application of safeguards to uranium mining, milling and processing.

The Federal Republic of Germany (FRG)

Australia's contribution to the Federal Republic of Germany's approach to the questions of accession to the NPT, and the interpretation of its terms, was made primarily through assisting the FRG to develop its own position on the question of support for the NPT. It did so through bilateral discussions on points of mutual concern.

As the treaty began to take shape in Geneva during early 1964, the Government of the FRG faced strong opposition from the Soviet Union to a nuclear non-proliferation treaty which allowed any kind of nuclear weapons sharing arrangement between itself and a nuclear weapon state.⁴⁸

Any compact which allowed a successor of the West German state to succeed to the joint possession of nuclear weapons as part of a politically united European state, or permitted it to participate, with its allies, in the "multilateral nuclear force" (MLF) then being promoted by the US, would be resisted as unacceptable by the Soviet Union.⁴⁹

⁴⁷ It should be noted that the *de facto* exemption of the initial stages of uranium mining and processing did not (and does not) extend to uranium ores *once they have been exported*. They cannot be exported unless the recipient state agrees to accept safeguards on any special fissionable material extracted from them.

⁴⁸ Inward Cablegram 77, Australian Embassy, Moscow (9 February 1968). Document A 1838/275: 719/10/6, Pt. 2 [100]. Canberra: Australian Archives. Willrich discusses the effect of the NPT on such "nuclear sharing" in a contemporaneous analysis. He concludes that the term "control" (over nuclear weapons) in Articles I and II means the actual control (for example, by the United States of warheads on the territory of the FRG) rather than any potential control by the FRG over those warheads. Willrich, M. (1968). The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear technology confronts nuclear weapons. *The Yale Law Journal*, 77 (8), pp. 1447-1519. At pp. 1467-1468.

⁴⁹ *Loc. cit.* At Note 7, Chapter IX, especially pp. 371-375. The American-inspired MLF concept called for the mixed manning, by member states of the NATO alliance, of United States Polaris missile

Later Soviet objections surrounded the probability that the safeguards provisions of Article III (4) of the NPT would allow a regional nuclear organisation such as Euratom, of which the FRG was a member, to negotiate a common safeguards agreement with the International Atomic Energy Agency.

The result, effectively, would be that the member states of Euratom, including the FRG, would be able to verify their own adherence to the terms of the treaty, using their own verification methods. The Soviet Union, while suspicious of such a self-policing arrangement, finally agreed to it during the Thirteenth Session of the ENDC, in the cause of successfully negotiating the treaty.⁵⁰ Nevertheless, early Soviet opposition, together with an initially strong current of popular resistance against the treaty from within sections of the West German polity, served to complicate the development of FRG policy on anti-nuclear proliferation.⁵¹

As late as February 1968, during the final ENDC negotiations in which it was a participant, the FRG still admitted a significant degree of difficulty with its own interpretation of the words of the treaty. This was confirmed by discussions held at that time between the Australian Ambassador to the Federal Republic of Germany, Ambassador Frederick Blakeney, and West German Disarmament Commissioner Schnippenkoetter on the terms of the NPT. In wide-ranging talks, they addressed the general difficulty caused by a lack of agreed interpretations by the Soviet and Western sides.⁵²

The principle in international law which this question raised, according to the Disarmament Commissioner, was the degree to which unilateral interpretations of

submarines, or a force of 25 missile-armed surface ships, either one acting as a nuclear deterrent force. It was first studied in detail by the Kennedy Administration in 1962. Its rationale was that an arrangement for *de facto* sharing of nuclear weapons capability among the NATO allies would appease the nuclear ambitions of some, including the FRG and France, and ease fears within some NATO states of a resurgent, nuclear-armed Germany.

⁵⁰ *Op. cit.* At Note 10, pp. 80, 99. See the full text of the NPT at Appendix 1.

⁵¹ *Supra.* At Note 48, pp. 499-502. Popular resistance against the treaty reduced after the Government of Chancellor Erhard was succeeded by the Christian Democrat/Social Democrat Coalition Government of Chancellor Kurt Georg Kiesinger in early December 1966. The new Government, while still partially sceptical of the text of NPT Articles I and II, was more flexible in its approach than its predecessor, thus deflating the more extreme elements of opposition within the FRG. Nevertheless, it still had to contend with the fact that the Soviet Union would place the blame for the failure of the NPT on the FRG if it did not itself sign and ratify the treaty. Inward Cablegram I. 23069, Australian Embassy, Washington (14 April 1967). Document A 1838/275: 719/10/6, Pt. 1 [84]. Canberra: Australian Archives.

⁵² Inward Cablegram 145, Australian Embassy, Bonn (21 February 1968). Document A 1838/346: TS 919/10/5, Pt. 16 [105]. Canberra: National Archives. At p. 1.

multilateral agreements were binding in law on the interpreting party itself, and on other parties to the agreement.⁵³ What, for example, would be the position in international law if, five years after the NPT had entered into force, the Soviet Union published a list of interpretations of its terms which contradicted those of the United States?⁵⁴

In this case, Commissioner Schnippenkoetter was referring to a list of interpretations of early versions of Articles I and II, given to all its NATO allies by the United States in 1967. It appears, in its final form, as an addendum to the *Report by US Secretary of State to President Johnson on the Nonproliferation Treaty*, which was submitted to the United States Senate in support of a request from President Johnson for the treaty's ratification.⁵⁵

A further complication arose because the US interpretations of Articles I and II had been made prior to the institution, at the final ENDC negotiating session in January 1968, of Article IV on the peaceful uses of nuclear energy. Would the additional, peaceful and positive provisions of Article IV thereby derogate from the specifically military intent of Articles I and II?

The German view was that the history of the NPT's negotiation, and its interpretative history, as revealed with the aid of the treaty's *travaux préparatoires* (preparatory work), were the best determinants of its legitimate interpretation.⁵⁶ This view reflects a teleological or "aims and objects" approach to the customary law of treaty interpretation which is incorporated into conventional international law in Article 31 (1) : "General Rule of Interpretation" of the 1969 *Vienna Convention on the Law of Treaties*.⁵⁷ Article 31 states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Op. cit.* At Note 10, p. 180.

⁵⁶ *Supra.* At Note 51.

⁵⁷ 1155 U.N.T.S. 331. The 1969 *Vienna Convention on the Law of Treaties* was opened for signature on 23 May 1969, but did not enter into force until 27 January 1980 following its 35th ratification. Harris, D.J. (1991). *Cases and materials in international law* (3rd rev. ed.) London: Sweet & Maxwell. At pp. 766-776. International Law Commission (2001). *Vienna Convention on the Law of Treaties* [on-line]. Available WWW: <http://www.un.org/law/ilc/texts/treaties.htm>.

It also takes account of the customary rule, expressed in Article 32 of the Convention, that recourse may be had to the *travaux préparatoires* as a supplementary or confirmatory means of treaty interpretation.⁵⁸

There is no official archival record of Australian concurrence with the views expressed by the representative of the FRG on these general principles in the customary international law of treaties. Indeed, Australia's part in the formulation of those views did not extend beyond a passive agency role, conducted in general diplomatic discussions.

The same may be said of the more specific discussions held between Australia and the FRG on the various terms of the treaty. Rather than enlisting the support of the FRG for its own points of view over the interpretation of the terms of the NPT, Australia acted as a sounding board for the newly formulated or still inchoate policy positions of a cautious and perplexed German disarmament bureaucracy.

In the Federal Republic's case, the geo-political and domestic contexts of its accession to the NPT made it essential that it understand the full significance of all the obligations it would be undertaking. Its place at the centre of Cold War European tensions, and as the front line host of United States and allied nuclear forces in Europe, underlines the contrast in the depth of legitimate concerns over the terms of the treaty between the FRG and its Australian interlocutor.

Nevertheless, both Australia and the FRG were faced with opposition (from the United States and the Soviet Union, respectively) to activities they regarded as falling outside the meaning of "manufacture" as used in Article II of the NPT. United States opposition to Australia's interpretation of the meaning of "manufacture" has been discussed in Chapter Five. Soviet resistance against a wide or liberal interpretation of the term was, as the FRG acknowledged, based on its desire to prevent *any* kind of nuclear research or development in the Federal Republic.⁵⁹

As a result, and in a process similar to Australia's discussions with Canada over the application of IAEA safeguards arrangements, a matter of mutual concern had generated a complementary legal interpretation of an important term in this most important of international nuclear control measures.

⁵⁸ *Ibid.*

⁵⁹ *Op. cit.* At Note 51.

The record of discussions between Australian Ambassador Blakeney and Disarmament Commissioner Schnippenkoetter, illustrates this point.⁶⁰ One of the most significant outcomes for Australia of its discussions with the FRG, was that they supported Australia's general assertion that the term "manufacture ... of nuclear weapons or other nuclear explosive devices" in Article II should not be given a strict or literal interpretation.

Both parties agreed that the term "weapon" - as used in the NPT - referred specifically to nuclear bombs and other nuclear warheads, and that - as a purely legal document - the treaty prohibited only the *production* of weapons so defined. It did not prohibit research and development directed solely towards improving a *capacity to produce them*.⁶¹

Paradoxically, that conclusion was supported by the general United States position, reiterated many times during the NPT negotiating process, that the treaty text should not be interpreted permissively; that it prohibited only those things which it addressed, and that it could not be interpreted as prohibiting anything else.⁶² Nevertheless, as noted above, the FRG, on the basis of the teleological interpretative approach to treaty interpretation discussed above, did not expect that such a fundamental aspect of the NPT would be accorded a universal interpretation which, in reality, would render the treaty useless.

In summary, Australia had played a peripheral but useful role in its discussions with the FRG by engaging it in debate on matters which concerned both countries, even though that concern came from different sources. Although its function had been more that of a passive catalyst than an active participant, Australia's residual disquiet over its prospective NPT obligations had found an echo in central Europe.

While not reflecting any legal interpretative influence on Australia's part, that echo had, at the very least, resulted in a unity of approach between the two parties on the central question of a state's obligation, under the terms of the treaty, to renounce forever any aspirations to the means of acquiring nuclear weapons.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* At p. 2.

⁶² *Ibid.* At p. 4. See also, for example, the Summary Record of a Meeting of officials of the United States and Australian Governments, Department of External Affairs, Canberra, 18 April 1968. Document A 1838/346: 719/10/6, Pt. 5 [158]. At pp. 13-15.

Other States

Australia's bilateral diplomacy on NPT issues, conducted with other nuclear threshold or otherwise important states, can be addressed in a collective way, since its shape and outcomes are broadly similar in respect of several representative states.

In general terms, Australia's diplomacy took the form of informal discussions at the United Nations Twenty Second General Assembly First Committee debate on the treaty.⁶³ However, because of its character, there is no convincing archival evidence suggesting that diplomacy of this sort conferred on Australia any specific interpretative influence, beyond establishing with other threshold states an outline of its major concerns.

For example, a report by the Australian Mission to the United Nations in New York, dated 8 May 1968, reviewed the positions expressed to it informally by various UN delegations at the NPT debate.⁶⁴ Ambassador Patrick Shaw noted in the report that South Africa, a significant uranium producer, had expressed in private discussions the concerns it shared with Australia over the possibility that Article III safeguards arrangements might be applied to uranium mining activities. He went on to note the probability that the strong views of the uranium producing but non-nuclear weapon countries (notably Australia, Canada and South Africa) would act to forestall any move within the IAEA to impose safeguards on mining activities.⁶⁵ In Australia's case, Ambassador Shaw noted, such a prospect was reinforced by its presence on the Board of Governors of the International Atomic Energy Agency.

This prospective unity of Australian and South African opposition to mining safeguards was confirmed by the contribution of South Africa's representative in the First Committee debate, Ambassador Botha, on 20 May.⁶⁶ In a speech sharply critical of the text and general aims of the NPT, Ambassador Botha emphasised the threat to

⁶³ The resumed session of the Twenty Second General Assembly reconvened on 11 March 1968. It adopted the revised resolution A/C.1/L.431 in plenary session on 12 June 1968.

⁶⁴ Inward Cablegram UN. 762, Australian Mission to the United Nations, New York (8 May 1968). Document A 1838/346: 719/10/6, Pt. 5 [140]. Canberra: Australian Archives.

⁶⁵ *Ibid.* At pp. 3, 4.

⁶⁶ *Op. cit.* At Note 11, p. 121.

national sovereignty and commercial confidentiality inherent in a safeguards regime which extended to cover the initial mining and milling of uranium ores.⁶⁷

On this aspect, then, Australia could point to a degree of interpretative solidarity (although not influence) with a nuclear threshold state then on the periphery of world events. The importance of whatever sway Australia held over South Africa's nuclear policy direction nevertheless lay in the fact that the United States believed that the South African Government should be persuaded to endorse the NPT in the General Assembly, in order to avoid the risk of encouraging other African states to reject the treaty.⁶⁸

In this context, it appears that the United States believed that South Africa's enemies in southern and eastern Africa, such as Botswana, Tanzania and Zambia, would see South Africa's refusal to acquiesce in US demands as a sign that they, too, could resist the treaty.⁶⁹ With no South African Government commitment not to acquire nuclear weapons, its near neighbours could not be expected to do so themselves by acceding to the NPT. Widespread desertion of the NPT ideal by African states - on this or other grounds - was capable, the US believed, of threatening the viability of the treaty.

There is some evidence of diplomatic contact between Australia and two other states, Sweden and Italy, whose interest in halting the proliferation of nuclear weapons made

⁶⁷ *Ibid.*

⁶⁸ Following Ambassador Botha's critical speech in the NPT debate, the United States undertook a strategy aimed at persuading the South African Government to endorse the treaty. Its two limbs consisted of the despatch of "a couple of people" to talk to the South African Government in Pretoria, and the release to South Africa of the text of the United States *Aide-Memoire* of 13 May 1968 to Australia. Each action was aimed at giving South Africa a detailed summary of the United States' interpretative approach to those elements of the NPT to which South Africa had voiced objections. *Aide-Memoire* of the Government of the United States of America to the Government of Australia, 13 May 1968. Embassy of the United States of America, Canberra. Document A 5882/2: CO 32, Pt. 2 [54]. Canberra: Australian Archives.

⁶⁹ US policy in regard to southern Africa was one in which it sought a balance between South Africa and those of its neighbouring states which, by late 1967, were becoming increasingly belligerent towards the *Apartheid* regime in Pretoria. Although it saw a need for widespread agreement among them to sign the NPT, the United States Government had been considering providing conventional defensive armaments to Tanzania and Zambia as a means of countering the ability of the South African armed forces to overwhelm them in combat. *The liberation movements of southern Africa*. Rufus Taylor, Deputy Director, Central Intelligence Agency. *Foreign relations of the United States 1964-1968, Volume xxiv: Africa: Section 408: national intelligence estimate NIE 70-1-67* (1967). Washington, DC: State Department. Available WWW: http://www.state.gov/www/about_state/history/vol_xxiv/zo.html . See especially: Southern Africa: US Policy: Precis - 1. Emphasis on African States.

them significant (if essentially peripheral) participants in the NPT negotiation process.⁷⁰ They are representative of those states, both neutral and aligned with a superpower, which were technically or economically capable of acquiring nuclear weapons, but were prepared to renounce them by supporting the treaty. In contrast, other states with the same nuclear potential had not confirmed any intention, prior to 1 July 1968, of making a commitment to nuclear non-proliferation.

For example, Brazil, India, Japan, the Netherlands, Poland, Spain and the United Arab Republic (Egypt) are all examples of states which were considered by the United States Atomic Energy Commission to be legitimate nuclear threshold states in 1968.⁷¹ Of these states, only Poland signed the NPT on its opening for signature on 1 July 1968.⁷² Others - notably Mexico and Nigeria - as active member states of the ENDC, sought a workable treaty text in the interests of global nuclear security, and were not then considered - at least by the USAEC - to be threshold states.

In both cases, any construction placed on specific provisions of the NPT text which coincided with Australia's own preferred position was, with a few exceptions, purely fortuitous. There is no convincing evidence to suggest that Australia's credentials as a nuclear-interested but non-nuclear weapon country were sufficiently strong, in 1968, to give it serious diplomatic legitimacy in nuclear matters with similarly placed states.

Nor is there evidence to suggest that Australia attempted to exercise any such agency, although the Australian Delegation to the United Nations in New York found "general support" among other delegations for Australia's proposition that states intending to sign the NPT should conclude safeguards agreements with the IAEA before ratification (thus settling the nature of inspection obligations thereby undertaken).⁷³

⁷⁰ *Supra*. At Note 64. Both Italy and Sweden were member states on the Eighteen Nation Disarmament Committee in Geneva during the NPT negotiation process. Italy had been the author of a proposal in the ENDC - the so-called *Fanfani Proposal* of 29 July 1965 - which sought to put pressure on the two superpowers to conclude a nuclear disarmament agreement. It proposed that the non-nuclear states should declare a moratorium on the acquisition of nuclear weapons for a specific period, after which they would once again be free to pursue their acquisition. Italy's proposed moratorium period was twenty years. *Op. cit.* At Note 8, p. 505. See Table 2.

⁷¹ *Supra*. At Note 9; Table 1.

⁷² *Op. cit.* at Note 11, p. 168.

⁷³ *Supra*. At Note 64, p. 6.

However, as noted in the Introduction to this Chapter, the Gorton Government had made a determined attempt, early in 1968, to canvass the views of a number of states on specific questions of concern.⁷⁴ The results of this informal survey, collated by the Department of External Affairs (DEA), revealed the patterns of approach by nuclear threshold states such as Italy and Sweden only to questions of specific concern to Australia, rather than (necessarily) to those states themselves.⁷⁵

Nevertheless, together with the policy positions of Canada and the Federal Republic of Germany (as reported by Australia's diplomatic representatives in those countries, and discussed above) the results were a valuable tool in the hands of Australia's diplomats at DEA, as they sought a coherent Australian response to the emergent draft NPT text.

As noted previously, the primary goal of senior officers within DEA was to develop a policy position on the treaty which was capable of support from the Gorton Cabinet. To this end, Australia's diplomats in Rome, Stockholm and at the IAEA in Vienna (as well as in Ottawa and Bonn) were directed to approach their counterparts on an informal basis, with a view to gaining an understanding of their governments' current difficulties with the NPT draft text. The depth of support around the world for a treaty aimed at halting the spread of nuclear weapons would be a central issue for the Gorton Cabinet in its final decision on support. The products of their quest were unsurprisingly varied. For example, Australian enquiries as to whether non-nuclear states could expect to retain control over the content of their safeguards agreements with the IAEA (should the Agency's safeguards system change) received two directly conflicting replies.⁷⁶

Canada held that changes to the safeguards system would indeed affect a state's obligations under Article III of the draft NPT, while diplomatic contacts at Vienna

⁷⁴ *Op. cit.* At Note 4.

⁷⁵ *Summary of answers to the questions about the draft treaty on the non-proliferation of nuclear weapons asked in cablegrams 627 and 803 to Washington and repeated to other posts.* (1 March 1968). Document A 1838/346: TS 919/10/5 [9]. Canberra: Australian Archives. Classified "Secret and Guard." Sweden is an example of a neutral state which, having approached the nuclear "threshold", then renounced nuclear weapons (in the late 1950s and early 1960s) after coming close to attaining the ability to produce a small, plutonium-based nuclear arsenal. Albright, D., & O'Neill, K. (1995). Jury rigged, but working. *Bulletin of the Atomic Scientists* [on-line]. Available WWW: <http://www.bullatomsci.org/issues/1995/jf95/jf95Albright.html> At p.2.

⁷⁶ *Ibid.* At p. 3.

doubted that changes to the IAEA safeguards system could automatically affect an international agreement between the Agency and sovereign states.⁷⁷

A more fundamental question for Australia was the attitude of other non-nuclear states to nuclear research and development which had the sole aim of improving a country's capacity to produce nuclear explosive devices, or which was capable of being directed towards that goal. On these questions, Australia's diplomats received similarly disparate views. An unnamed Italian informant was sceptical of the ability of non-nuclear states even to acquire access, from any source, to nuclear technology, while adding that it was impossible to comment on whether Article II of the treaty forbade nuclear research with both civilian and military applications.⁷⁸

Again, as noted above, the West German view was that, in strictly legal terms, the treaty did not prohibit research and development with weapons potential. Nevertheless, such an interpretation was unlikely to survive the treaty's implementation, although dual-purpose research seemed permissible.⁷⁹

Finally, and in contrast, the view from Stockholm was that the strict legal interpretation was capable of enduring, thus carrying the implication that all research and development, whether for peaceful purposes or "other purposes" short of actually assembling a nuclear bomb would be permitted.⁸⁰

Even the contemporaneous views expressed to Australian diplomats by sources within the IAEA at Vienna on the effect of Agency safeguards on Australia's uranium export industry were ambiguous. Being of a wholly technical nature, they were, it was believed in Vienna, best answered by a state's own technically competent authorities - in Australia's case the Australian Atomic Energy Commission.⁸¹

There is no doubt that the various responses received from DEA's informal survey were useful in its formulation of final policy recommendations on Australia's response to the NPT.⁸² However, the testing of the direction of world opinion in this

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* At pp. 7-9.

⁷⁹ *Ibid.* At pp. 8-9.

⁸⁰ *Ibid.* "Other purposes" being of a (presumed) military nature.

⁸¹ *Ibid.* At pp. 10-13.

⁸² The final manifestation of the consolidated nuclear non-proliferation policy formulated by DEA appeared as a draft Submission to Cabinet in early August 1968. It did not become a formal Cabinet

way does not amount to an attempt to carry weight with states whose interest in nuclear proliferation matters, and in the NPT itself, was diverse, varied in intensity and guided by myriad local, regional and strategic considerations. It is true, for example, that Brazil, India and Spain, among others, had complained in the Thirteenth Session of the ENDC that the safeguards provisions of Article III were discriminatory,⁸³ and that the Report of the augmented Defence Committee submitted to the Australian Cabinet on 26 April 1968 pointed to that fact.⁸⁴ There is, however, no reason to conclude that Australia played a part (with the exceptions outlined above) in convincing these or other ENDC member states, or other independent non-nuclear states, of that position, nor of any other important reservations which Australia harboured.

Australia's policy on other matters raised by the NPT text, such as possible commercial espionage on uranium mining activities, access to peaceful-use nuclear technology, the need for a model safeguards agreement, the cost of inspection activities, and so on, were shared by many other states, and were voiced by them in the General Assembly debate. It is not possible, however, to conclude that Australia, without a seat at the ENDC table (notwithstanding its "designated" status at the International Atomic Energy Agency) and as only a newly nascent supplier of uranium on world markets, was capable of any more than incidental influence over many nuclear threshold *or* anti-proliferation activist states.

Australia and NPT Interpretation: Conclusion

The full scope of Australia's demonstrable ability to have its voice heard, its concerns accommodated and its interpretation of conventional international nuclear law acknowledged (and implemented) in the international arena is a function of two separate processes. On one hand, Australia had used its security alliance relationship with the

Submission (that role, for Cabinet Submissions on the NPT, having been taken on by the Department of Defence's augmented Defence Committee). *Draft Cabinet Submission: Non-Proliferation Treaty* (August 1968). Document A 1838/346: TS 919/10/5, Pt. 16 [70]. Canberra: Australian Archives.

⁸³ *Supra*. At Note 11, p. 101. Those states pointed to the fact that Article III was discriminatory in that it did not cover the peaceful nuclear activities of the "declared nuclear weapon states", as defined in Article IX (3) of the NPT final text.

⁸⁴ *Op. cit.* At Note 21, pp. 5, 6.

United States as a lever with which to move its superpower ally on issues of treaty interpretation which America would have preferred to leave - at least initially - undefined, or to postpone until a more opportune time. By doing so, Australia had focused Washington's attention on what it might have to concede, even to friendly nuclear threshold states, in order to conclude a viable multilateral nuclear treaty.

Furthermore, and almost accidentally, Australia's forthright approach to its international stance on nuclear weapons acquisition had led the US to use its response to Australia as a guide and template for its reaction to the concerns of other allied and neutral countries.⁸⁵ In this way, Australia became, by proxy, influential with the member states of the European Atomic Energy Community, the North Atlantic Treaty Organisation, the United Kingdom, Canada, Japan and South Africa.⁸⁶ Conversely, Australia had also become active in discussing its difficulties over the prospect of an irreversible legal renunciation of nuclear weapons with other states, both nuclear and non-nuclear, allied and neutral, which held similar misgivings.

The summation of the results of each process provides the full measure of Australia's nascent, but still inchoate, status as an active and legitimate participant in the full range of international nuclear disarmament efforts. It also allows an assessment of the practical result of Australia's NPT diplomacy, in terms of the future efficacy of the treaty as it evolved to meet new challenges.

In addressing the first process, it must be acknowledged that, as far as the implications of the draft *Nuclear Non-Proliferation Treaty* were concerned, Australia's relationship with the United States was unique when compared to all other states. The complex matrix of strategic, political, economic, commercial, historical and cultural ties between the two countries, underpinned by the ANZUS strategic defence alliance, ensured that the US would regard Australia as an essential NPT supporter.

That relationship also led Australia to enlist its unforeseen leverage with its superpower ally in pressing for an outcome in the field of nuclear weapons acquisition which was superior to what its technical, industrial and military status might suggest it could hope for. The full price for America of Australia's signature on the NPT was, as a result, higher than the United States had anticipated, and, ultimately, higher than it was

⁸⁵ See Chapter Five: *Denouement*.

⁸⁶ *Ibid.*

prepared to pay.⁸⁷ Nevertheless, to the extent that Australia *was* able to influence the international legal interpretation of the terms of the NPT, it had largely done so either in direct diplomacy with the United States, or indirectly (through the US) with threshold and non-nuclear states allied to America, as well as the United Kingdom and Japan.

However, as far as Australia's ancillary bilateral diplomatic activity was concerned, the outcome is less clear. Although, as discussed above, there is evidence indicating some degree of bilateral engagement with, for example, the Soviet Union, the Federal Republic of Germany and Canada on matters of mutual interest, it lacked the depth and range necessary to establish for Australia a pattern of guidance or agency with those states.

Australia's ability to make its voice heard on a bilateral basis was, in fact, effectively limited to the latter two states. Australia's discussions with government representatives in Bonn and Ottawa had served, at the very least, to focus the thinking and strengthen the resolve of each government on two important interpretative questions. In the case of the FRG, this amounted to the need to know, with clear definition, exactly how restrictive the terms of Article II on manufacture of nuclear devices would be. As far as Canada was concerned, the most important issue was the threat posed by Article III through the imposition of IAEA safeguards over its uranium mining activities.

Each matter was also of vital interest to the Gorton Government, and would be pivotal in its final decision whether to sign, and then ratify, the NPT. It is not unreasonable, therefore, to suggest that the discovery of significant similar concerns within the governments of two important Western allies served only to strengthen Australia's own resolve to engage the US over nuclear proliferation *on its own terms*.

The extent of its success has been discussed in Chapter Five.⁸⁸ In summary, it comprised two sets of specifically expressed interpretations, noted in the United States Government's *Aide-Memoires* of 6 and 13 May 1968. The first addressed the US interpretation of the term "manufacture" of nuclear devices as used in Articles I and II of the treaty, while the second was concerned with the implementation of the IAEA

⁸⁷ See Chapter Five: *Introduction*, at Note 2. The United States was, for example, not prepared to concede Australia's preferred interpretation of "manufacture ... of nuclear weapons" in Article II of the NPT as allowing research and development activities which had *any* purpose other than a peaceful one.

⁸⁸ *Supra*. At *Introduction*.

safeguards arrangements provided for in Article III.⁸⁹ More specifically, the US had made a clear statement that it intended to take a wide or inclusive view of activities it regarded as constituting the "manufacture" of nuclear explosive devices. However, that definition, while it covered the production of components necessary for the fabrication of a nuclear device, was unlikely to extend to the enrichment, stockpiling or research into the physical properties of fissile material (such as metallic plutonium) for peaceful purposes under appropriate safeguards.⁹⁰

Furthermore, the US assured Australia that it would retain the right to reject individual IAEA inspectors, would maintain control over the content of its own Safeguards Agreement, and - most importantly for Australia - that its uranium mining operations would *not* be subject to safeguards inspection.⁹¹

The final assessment of Australia's ability to have its voice heard above the clamour of many other states over the inherent deficiencies of the 1968 *Nuclear Non-Proliferation Treaty* must, however, acknowledge Australia's limitations. As a state with limited economic, industrial and technical resources, and only a relatively primitive nuclear research programme, Australia seemed poorly placed in 1968 to exert any lasting influence on larger and more advanced countries. Nevertheless, as a significant Western power in the Asian region, its superpower ally held it to be an essential signatory of the new treaty. As this study has shown, the United States confirmed that view through both its words and actions.

Perhaps Australia's greatest advantage, however, was its immense potential as a reliable supplier of uranium on world markets. With a twenty-three fold increase in known reserves of uranium ores between 1967 and 1974, and an estimated twenty-five percent of total known global reserves of uranium by 1976, Australia had begun to fulfil that potential.⁹² Had Australia translated those actual and potential advantages into

⁸⁹ Document A 1838/346: TS 919/10/5, Pt. 10 [108]. *Aide-Memoire of the Government of the United States of America, United States Embassy, Canberra. 6 May 1968.* Canberra: Australian Archives. Document A 5882/2: CO32, Pt. 2 [54]. *Aide-Memoire of the Government of the United States of America, United States Embassy, Canberra, 13 May 1968.* Canberra: Australian Archives. At p. 2.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Titterton, E. W. & Robotham, F. P. (1979). *Uranium: Energy source for the future?* West Melbourne: Abacus. At pp. 110, 168.

tangible outcomes for the new conventional international law of nuclear proliferation? The answer must be that it had. Many important nuclear threshold states, including Japan, South Africa, and the Euratom and NATO states were each now aware, through America's adoption of Australia's suggested legal interpretations, of the probable legal status, effects and scope of the new NPT safeguards system.

They were also equally aware, through the same process, of the intention, and the degree of interpretative flexibility, behind a form of words - "... manufacture ... of nuclear weapons ", where meaning was open to a wide range of alternative interpretations. Although these and other initial concerns would be resolved as the NPT gained acceptance and operational experience, answers to such questions were by no means settled or clear early in 1968, even to states then engaged in the treaty's negotiation in Geneva.

America's response to Australia's refusal to accept, without question, the nuclear weapons *fait accompli* presented to it, had helped to clarify - for a number of globally significant states *including the United States itself* - the practical consequences of their accession to the new nuclear bargain. That outcome could only enhance the NPT's chances of survival through the confidence of states that the treaty could work against their need to acquire nuclear weapons to counter perceived nuclear threats.

By the same token, it also improved the NPT's ability to evolve to meet changing circumstances by demonstrating that a potentially universal multilateral treaty could respond to change through flexibility in the accepted interpretation of its terms. It was not essential, therefore, that modifications to the NPT should occur solely through the potentially lengthy and difficult formal amendment procedure laid down in paragraphs 1 and 2 of Article VIII.

Interpretative clarity itself could be achieved only through growing global consensus between states. It was fortunate, therefore, that this process began well before the NPT was opened for signature. Its early success in gaining adherents, its later growth, and its survival for over thirty-three years must, at least in part, be ascribed to its strong beginning.

As this study has shown, Australia played a significant role in the treaty's institution as the world's most important multilateral nuclear convention. In addition, its initial contribution to nuclear disarmament law was only the start of a continuing era of nuclear activism. The combination of its place in the global security strategy of the United States, its prominent status as a large-scale world uranium producer, and its

willingness to use both assets in its search for a nuclear accommodation with America and the rest of the world, ensured Australia's emergence as an active anti-nuclear campaigner. The resolution of its own ambivalence over the nuclear weapons option was the catalyst which propelled Australia, standing on American shoulders, into global nuclear disarmament prominence.

CHAPTER SEVEN

GENERAL CONCLUSIONS

Introduction

This study began by presenting, in its Introduction, a summary of its context, purpose, structure, theoretical foundations and methodology, while noting the deficiencies in the literature which it addresses.

At a time when the United States and the Soviet Union were making determined efforts to create a global legal barrier against the acquisition by states of nuclear weapons, Australia was expected - by both superpowers - to support such a move wholeheartedly. It did not do so. Using documentary material recently released into the public domain by the Australian Archives, the study has presented a chronicle of Australia's resistance to the terms of the 1968 *Nuclear Non-Proliferation Treaty* which it regarded as inimical to its national interests.

In doing so, it has employed an inter-disciplinary theoretical framework for its analysis which draws on both public international law and international relations theory, while recognising the deficiencies inherent in each.

The study began, in Chapter One, with a critique of the nature, aims, deficiencies and potential for success which is evident both in the black letter law of the NPT itself, and in the nuclear non-proliferation regime which surrounds it. It concluded that the NPT remains the central pillar and brightest hope for global nuclear arms control in the absence of a more effective instrument (such as a multilateral Nuclear Weapons Treaty banning all such devices).

Chapter Two focused on the components of the domestic and international context in which Australia developed its response to the new treaty, an urgent requirement in view of its imminent conclusion and of America's expectation of Australia's unqualified support. The chapter traced divisions over nuclear policy within the Australian bureaucracy and political leadership which this need brought into sharp focus. In doing so, it introduced the two pre-eminent institutional participants in the policy debate, the Australian Atomic Energy Commission and the Department of External Affairs.

Chapter Three developed the theme of dynamic nuclear policy development by examining the struggle for policy dominance between these two Australian government bureaucracies, while introducing the relationship between the Department of External Affairs and the US Arms Control and Disarmament Agency. It presented that relationship as a crucial element of DEA's ability to rebut the vehement, and often ill-founded, resistance of AAEC to the proposition that Australia should permanently renounce the nuclear weapons option. The chapter concluded that this policy debate was the wellspring of Australia's private and public reluctance to acquiesce in America's desire for a swift endorsement of the hard-fought NPT text. The debate was also the catalyst which eventually led to Australia's disproportionate influence over the interpretation of the treaty's terms.

Chapter Four traced the course of the debate on the NPT within the Australian government, a process in which the "bomb lobby" and its champion, the AAEC, met steadfast resistance from DEA, assisted by the presence in Canberra of a high-level delegation from its American interlocutor, the US Arms Control and Disarmament Agency. The final decision of the Australian Cabinet on Australia's nuclear weapons policy, spelt out in the United Nations General Assembly debate on the NPT in New York, reflected elements of a continuing domestic policy debate in which both sides retained hope of eventual success.

Chapter Five moved the focus of analysis to the UN debate in New York, and to the process by which Australia exercised its new-found influence over the United States in order to advance its own position on interpretations of the terms of the treaty. The limit of America's willingness to shift ground on specific issues was made clear, as was the process by which Australia's diplomatic manoeuvres in New York were translated into guidance over NPT interpretation directed to many other US allies.

Chapter Six assessed this process, and the limited level of bilateral diplomacy in which Australia engaged a number of states with specific concerns over the NPT, in order to draw final conclusions on the degree of influence Australia exhibited over the interpretation of its terms. It concluded that the success of its US experience was not matched by its direct bilateral diplomacy, in which Australia could claim only marginal agency over important elements of the nuclear weapons bargain.

In addition, Chapter Six drew the general conclusion that Australia could claim a significant role in the formation of the world's most important multilateral nuclear convention, principally through its insistence on interpretative clarity.

This chapter begins by addressing the period between 1 July 1968, when the NPT was finally opened for signature, and 23 January 1973, when the newly elected Whitlam Labor Government deposited Australia's instrument of ratification with the three Depository Governments in accordance with Article IX (2) of the treaty.¹

On the Brink: Australia from Gorton to Whitlam

From 1 July 1968 until 27 February 1970, when the Gorton Government signed the NPT, Australia remained poised between the need to avoid being seen by the United States and others as a nuclear non-proliferation "spoiler", and the opposing residual influence of its "bomb lobby" nuclear warriors within the Cabinet and elsewhere. In other words, Australia's nuclear weapons policy was still in the balance. Gorton was loathe to have Australia sign the treaty and saw no immediate need to do so, especially since it was yet to demonstrate a potential for universal adherence. His own pre-eminence within the bomb lobby ensured that Australia's signature would be delayed for as long as possible.

The position was summarised by the Secretary of the Department of External Affairs, Sir James Plimsoll, in a personal note to his Minister, Paul Hasluck, in the period leading up to the new treaty's commendation by the United Nations General Assembly in June 1968.² Noting the need for Australia to be careful not to appear to be against the NPT, Plimsoll stated that it would be "disastrous" if the global perception was that Australia had "killed off" the treaty, and that some governments would be "only too glad to blame us". Crucially for Australia, the Americans would "take it very badly" if they saw Australia as being responsible for its demise. He ended by urging:

If it fails, let Australia not bear the principal responsibility for its collapse in the eyes of the world and of Australian public opinion.³

¹ *Signatories and parties to the Treaty on the Non-Proliferation of Nuclear Weapons* (1998). Washington, DC: United States Arms Control and Disarmament Agency [on-line]. Available WWW: <http://www.state.gov/www/global/arms/treaties/npt3.html> . See Appendix II.

² Taylor, C. Historical Records Branch, Department of Foreign Affairs and Trade, Canberra. Non-archived records. No date.

³ *Ibid.*

The treaty still awaited the deposition of instruments of ratification by the required forty States Parties signatory to it, in addition to those of the three Depository States, the United States, the United Kingdom and the Soviet Union, in order to enter into force.⁴ Until that time, Australia could continue to adhere to the policy defined by the Gorton Cabinet in preparation for the UN debate in New York. This was summarised in its Decision No. 95 of 26 March 1968:

.... Australia welcomes in principle the objective of a non-proliferation treaty, hopes that an effective way can be found of achieving it, but [must take account of] the implications of [the proposed treaty] for Australia's national interest.⁵

By early 1970, with over forty instruments of ratification having been deposited, including that of the United Kingdom, it was apparent that the United States and the Soviet Union were preparing to deposit their own instruments of ratification, thereby bringing the NPT into force. Australia had finally reached the point beyond which, if it continued formally to resist the treaty, it could expect little sympathy from its strongest ally, or from the growing number of states, both threshold and non-nuclear, that were now acceding to it. The effect on the strength of Australia's security alliance with the United States could be expected to be immediate and severe.

As a result, the Gorton Cabinet reluctantly moved to sign the treaty. In a press statement issued on 18 February 1970, Gorton announced his Government's decision, making plain his Cabinet's doubts over the potential effectiveness of the NPT, while emphasising the fact that signature "is not to be taken in any way as a decision to ratify the [t]reaty".⁶ Furthermore, Gorton pointed out, Australia's signature would be accompanied by a statement of Reservations, the satisfaction of which would be a prerequisite for Australia's subsequent ratification.⁷

Australia, still led by its distinctively nationalist and nuclear advocate Prime Minister, had thereby given effect to the minimum level of acquiescence in the terms of the treaty which both the United States and world opinion would accept. The list of its

⁴ Article IX (3) of the NPT. See Appendix II.

⁵ Cabinet Decision No. 95, 26 March 1968. [39] Available WWW: http://www.naa.gov.au/COLLECT/cabpaper/Cabinet68/images/Decision_95_18.htm. At p. 3.

⁶ Document PM. No. 30/1970 [129]: *Statement by the Prime Minister, Mr. John Gorton, 18 February 1970: Signing of Nuclear Non-Proliferation Treaty*. Canberra: Australian Archives.

⁷ *Ibid.* At p. 2.

Reservations, made pursuant to customary rules on the accession by states to international treaties and appended to Australia's signature on 27 February 1970, was long and complex.⁸

The weight of Australia's Reservations lay in two basic issues. The first was the Gorton Government's continuing concern that the NPT should not in any way hinder, or discriminate between, states in the development of peaceful uses of nuclear energy, including the peaceful application of nuclear explosions.⁹ The second issue was its need to reaffirm its belief that the NPT did not affect continuing security commitments by the United States under the ANZUS Treaty, nor Australia's right of individual or collective self-defence contained in Article 51 of the Charter of the United Nations.¹⁰ In other words, that Australia's nuclear security would remain unimpaired.

On 5 March 1970, six days after Australia signed the treaty, it entered into force following the deposition of instruments of ratification by the United States and the Soviet Union.¹¹

In the period of twenty months between the treaty's opening for signature on 1 July 1968 and the date of Australia's signature, during which Australia continued to hold the NPT at arm's length, the treaty began to exert its influence as the emerging cornerstone of a range of multilateral and bilateral nuclear arms control initiatives.

The most immediate result was the Conference of Non-Nuclear Weapon States, held at Geneva from 29 August to 28 September 1968. The Conference provided the first opportunity, following the opening of the NPT for signature, for Australia to explain and defend its position in an international forum.¹² Its participants were to

⁸ Document M/15 [130]. (27 February 1970). *Department of External Affairs News Release: Signature of Non-Proliferation Treaty*. Canberra: Australian Archives. The 1969 *Vienna Convention on the Law of Treaties* did not enter into force until 27 January 1980, in accordance with its Article 84 (1). *Supra*. At Note 27.

⁹ *Ibid.* At paragraphs 8-12.

¹⁰ *Ibid.* At paragraphs 5, 6. See Appendix I.

¹¹ Both the United States and the Soviet Union had signed their respective instruments of ratification on 24 November 1969, following full US Senate approval on 13 March 1969. The Soviet Union did so as a result of the decision of West Germany, on 28 November 1969, to sign the treaty. Maddock, S. J. (1997). The nth country conundrum: The American quest for nuclear nonproliferation, 1945 - 1970. Doctoral dissertation, University of Connecticut. *Dissertation Abstracts International*, 58 -06A, 2362. At p. 522.

¹² *Cabinet Submission No. 278: Conference of Non-Nuclear States*. Document A 5882/2: CO 32, Pt. 2 [68]. Canberra: Australian Archives.

include nearly all of the threshold nuclear weapon states, including the four states identified in Australian Cabinet Decision No. 165 of 29 April 1968 as significant for Australia in the Asian region (Japan, Indonesia, India and Pakistan). As a result, it seemed prudent and necessary that Australia should attend.¹³

Australia's representatives would be able to defend the crucial interpretations of the terms of the NPT which it had worked so assiduously to establish with the United States. They would also be in a position to rebuff any efforts by non-nuclear weapons states to undermine Western policy positions on nuclear disarmament, security guarantees to non-nuclear weapon states, the use by nuclear weapon states of nuclear weapons in defence of their allies, and technical assistance in the peaceful application of nuclear energy.¹⁴

Furthermore, Australia would have an opportunity to reinforce with the non-nuclear weapon states its position on the application of materials diversion safeguards, and the exchange of nuclear information, equipment and materials for peaceful purposes.¹⁵ In short, Australia could not afford to ignore an international forum in which its own nuclear policy positions could be elaborated, reinforced and defended. Its failure to attend held the potential for Australia to be sidelined in the process by which the new treaty would be transformed from black letter international law into a practical and successful global bargain.

An Australian delegation led by Sir Laurence McIntyre, Deputy Secretary of the Department of External Affairs, and including representatives from the Department of Defence and the Australian Atomic Energy Commission, attended the Conference.¹⁶ While its attendance succeeded in avoiding the potential for international opprobrium, Australia continued to insist that it would not ratify the treaty until its Reservations had been satisfied.

The United States was, in any event, in no position by September 1968 to insist that Australia do so, US Senate ratification having been stalled by the invasion of

¹³ *Ibid.* At p.4.

¹⁴ *Ibid.* At pp. 3, 6, 7, 8.

¹⁵ *Ibid.*

¹⁶ Conference of Non-Nuclear Weapon States. (1968). *Current Notes on International Affairs*, 39 (8), pp. 346-347.

Czechoslovakia by Soviet forces on 20 August 1968. However, newly installed United States President Richard Nixon, after brief consideration, resubmitted the treaty for ratification by the US Senate in February 1969. The Senate subsequently ratified it on 13 March 1969, enabling its entry into force by instrumental deposition one year later.¹⁷

Nevertheless, the period between the NPT's opening for signature and its entry into force had been one of growing scepticism within the United States Government that it would eventually prove successful. The Czech crisis had dealt a significant blow to the treaty's prospects, especially since it had weakened support for it among many NATO states, who saw immediate accession as too conciliatory a gesture towards the Soviet Union.¹⁸

As a result, both West Germany and Italy decided against immediate signature. The unstable security situation in Europe, combined with the imminent change of government in Washington, marked the most critical point for the new global nuclear agreement. In fact, its future now depended heavily on the resolution of a political stalemate: unless Germany signed, the Soviet Union was unlikely to ratify, while few Western states and US allies would sign or ratify while Soviet forces remained in occupation in Czechoslovakia.¹⁹

The effect of the situation for Australia was vindication, at least for the supporters of an independent nuclear deterrent within Cabinet (and especially for Sir Philip Baxter, Head of the Australian Atomic Energy Commission) of the wisdom of its Reservations in respect of the security commitments made by the three Depository States.²⁰ The security situation in Central Europe was, to them, cogent proof that a non-proliferation pact was indeed both dangerous and avoidable.

¹⁷ *Supra*. At Note 11, pp. 518, 522.

¹⁸ *Ibid.* At pp 520-521.

¹⁹ *Ibid.*

²⁰ *Supra*. At Note 11. While those security commitments were of lesser significance to Australia than to many states (in view of the extant ANZUS Treaty between itself, New Zealand and the United States) the Gorton Cabinet had included in its Reservations (at paragraph 6) a reference to the "weight" which the Government of Australia attached to the statements of the United States, the United Kingdom and the Soviet Union declaring their intention to seek immediate Security Council action to provide help to any non-nuclear weapon state party to the treaty that was subject to aggression or the threat of aggression with nuclear weapons. The statements had been made to the Security Council on 17 June 1968, and were acknowledged by it in Security Council Resolution 255.

For Australia, the period of transition ended on 23 January 1973, when the newly elected Australian Labor Government, led by Prime Minister E.G. Whitlam, moved swiftly to ratify Australia's signature on the NPT. This marked the final step in Australia's journey from nuclear ambivalence to committed anti-nuclear activism. The Australian Labor Party and its Leader had expressed strong support for the principle of nuclear non-proliferation in Opposition, Whitlam having in 1969 accused his opponents of harming Australia's relations with the United States and risking the future of the NPT through their refusal to sign.²¹ Describing the Gorton Government's February 1970 signature as "accepting the inevitable in the most graceless and grudging manner possible", Whitlam now lost little time in ratifying it.²²

The Australian "bomb lobby" nuclear advocates had finally reached the end of the road. They could draw little comfort from the fact that the Gorton Government's Reservations, made on signing the treaty, remained in force following Whitlam's ratification, and were not removed until 29 August 1985.²³ Although Australia had run a serious risk of being labelled an NPT "spoiler" by the international community, the initial reluctance of important states such as Italy and West Germany to embrace the treaty in an international legal (as well as a political) sense had helped to ameliorate that risk.

With the advent of the Nixon Presidency in January 1969, and its more moderate concern - in comparison to the previous Administration - to see the NPT finally in force, Australia could move towards full accession in a measured way, having demonstrated to the world that its caution in abandoning the nuclear weapon option had been well founded.

²¹ Tooth, G. (1987). *Australia and the Treaty on the Non-proliferation of Nuclear Weapons*. Unpublished Honours Thesis, University of Tasmania, Hobart, Tasmania. At pp. 26, 27.

²² *Ibid.* Gough Whitlam has expressed to the author his anxiety to have the NPT ratified by Australia at the earliest possible date, and his satisfaction at having done so. E. G. Whitlam, personal communication, July 2000.

²³ By notification, of 29 August 1985 Australia advised the Depository Governments that its declaration made on signature "no longer accurately reflected the position of Australia" [1486 UNTS 328].

Australian Nuclear Influence

This study has followed the course of Australia's engagement in a matter of considerable global importance. The creation of a multilateral treaty hindering the spread of nuclear weapons around the world which was capable of attracting widespread support among nuclear threshold states was a crucial turning point in twentieth century international relations. Australia's initial reluctance to embrace the anti-proliferation principle does not detract from its later enthusiasm. Since Australia possessed only moderate economic, technical and military strength within a geographically isolated region bounded by culturally and politically diverse neighbours, its reliance on an American security agreement (the ANZUS Treaty) was inevitable. Nevertheless, the uncertainties of nuclear security within a US alliance relationship, in an age of increasingly widespread nuclear weaponry, could not be a realistic long-term alternative to a successful non-proliferation treaty.

It was equally predictable that Australia's ability to make its voice heard on the world stage on matters of concern to it in nuclear international law and politics would, given the continuing strength of that alliance, largely be a function of its ability to influence the government of the United States. In these circumstances, the study's most surprising finding is the paradox revealed by the evidence it has presented.

There is no doubt that the Johnson Administration had placed the successful conclusion of the NPT high on its list of priorities in government.²⁴ Its almost continuous efforts to achieve that goal during negotiations at the Eighteen Nation Disarmament Committee from 1964 to 1968 attest to its sincerity. There is also no doubt that the United States expected its Australian ally to accede, without demur, to the terms of the NPT until shortly before its text was finalised in negotiations with the Soviet Union and the sixteen other states at Geneva.²⁵ As a strong supporter of the Western Alliance within its own region and globally, Australia appeared to possess little room for manoeuvre on what it could and could not accept in terms of this most important of multilateral treaties. Nevertheless, the agency which Australia exercised in

²⁴ *Supra*. At Note 11, p. 521.

²⁵ Document A 1838/346: TS 919/10/5, Pt. 6 [38]. (25 March 1968). *Aide-Memoire of the Government of the United States of America, United States Embassy, Canberra. 25 March 1968*. Canberra: Australian Archives.

its own favour, and in the context of its security alliance with the United States and New Zealand, was successful precisely because it refused to acquiesce in the terms of an international legal obligation which it found unacceptable for domestic political reasons.

The result was that Australia exercised its surprising degree of influence with the United States over the prospective interpretation of the terms of the new treaty by taking a position contrary to the purpose and spirit of its US security alliance - while that alliance remained firmly in place. Perhaps equally surprising is the fact that the alliance proved capable of withstanding the test.

In a more general sense, it is reasonable to conclude that the story of Australia as nuclear recalcitrant is a vivid example of its growing middle power status. The universally acknowledged importance of international measures to prevent the spread of nuclear weapons around the world gave Australia an ideal global forum in which to demonstrate its credentials as a "world citizen".

Widespread acceptance around the world, over the past three decades, of Australia's self-appointed role as an activist in nuclear affairs is a powerful indicator of the growing ability of moderately strong states to exercise significant agency both on their own account and in concert with other states. The realignment of international relationships following the end of the Cold War has served only to enhance and magnify that trend.

Theoretical Conclusions

The primary focus of this study has been Australia's engagement in the negotiation of the conventional international law of nuclear non-proliferation, an event of global significance. It has traced the origins of Australia's transition from nuclear adjunct of the United States, yet with residual independent nuclear ambitions, towards a stance of overt, consistent and widely acknowledged anti-nuclear activism.

Furthermore, by using the negotiation of the 1968 *Nuclear Non-Proliferation Treaty* as the vehicle for its analysis, the study has developed the elements of a "middle power" model for Australia's involvement in nuclear arms control and disarmament measures during the following three decades. In doing so, it has demonstrated the legitimacy and utility of an interdisciplinary theoretical approach to analysis of the

nature of relations between states on the threat or use of force in international affairs. The study has taken the view that, at least in this important arena of global endeavour, the legal and political perspectives form two sides of the same coin; that, as Slaughter-Burley has proposed:

In the end, law informed by politics is the best guarantee of politics informed by law.²⁶

In acknowledging this interdisciplinary reality, the study has prepared the ground for further scholarship by showing that Australia's NPT story is relevant to:

- the increasing acceptance of the *interpretation* of the terms of conventional international law as a more flexible alternative to formal reservations and amendments under customary principles of international law, as codified and restated in the 1969 *Vienna Convention on the Law of Treaties*.²⁷
- the relative strength of states' propensities to adhere to obligations in international law in areas of perceived weaker and stronger national and international importance. One example in this respect is the relative importance states ascribe to environmental international law.
- a liberal approach to interdisciplinary scholarship on the nature of international rules binding states in their inter-relations.²⁸

The most important theoretical conclusion of this study is its support for the legitimacy and utility of an interdisciplinary analytical approach to the use of international rules in moderating the use of force in relations between states.

The central question for both international lawyers and theorists of the nature of international relations between states is one which is also crucial for operational

²⁶ Slaughter-Burley, A. (1993). International law and international relations theory: A dual agenda. 87 *A.J.I.L.* 205. At p. 239.

²⁷ *U.K.T.S.* No. 58 (1980), Cmnd. 7964; 1155 *U.N.T.S.* 331; 8 *I.L.M.* 679 (1969); 63 *A.J.I.L.* 875 (1969).

²⁸ Burley, A. (1992). Law among liberal states: Liberal internationalism and the act of state doctrine. *Columbia Law Review*, 92 (8), pp. 1907-1995.
Slaughter, A. (1997). The real New World Order. *Foreign Affairs*, 76 (5), pp. 183-197.

flexibility in the interpretation of the meaning of the terms of treaties: how can sovereign states co-operate, while at the same time competing for ascendancy in a situation of anarchy?²⁹

The clearest explanation is that they expect to derive significant benefits by doing so. In the arena of the use of force by states, and especially the use of weapons of mass destruction in war, it not surprising that states should seek out all available ways of avoiding their annihilation by enhancing their individual understanding of the collective obligations they have undertaken. It is less clear why states co-operate in international affairs in which they hold no grave fears for their survival, such as maritime or environmental international law. The fact is, nevertheless, that they almost invariably do co-operate to achieve mutually acceptable goals, having determined that their adherence to promised action is firmly in their long-term interest.

Mutual comprehension of the nature of the individual and collective promises which states make in terms of unique and common concerns, and of the rules which define and guide those undertakings, is an absolute prerequisite for the success of bilateral and multilateral bargains. In the case of the 1968 *Nuclear Non-Proliferation Treaty*, a serious failure of understanding had an obvious potential for global catastrophe.

In these circumstances, states must assume that all states are willing to be bound by international law to a degree which attenuates their absolute sovereign right of action. Thus, states will undertake international legal obligations because they believe that it is in their national interest to do so, and that the dangers inherent in ignoring the strictures of the law are too great to risk.³⁰

International law and international politics have as their common goal the enhancement of mutual understanding between nation-states. In other words, both domains aim to bring about the most advantageous outcomes possible within a community of states which lacks a supra-national coercive mechanism. The structures which link these domains are exemplified by the matrix of institutions, agreements and understandings which has been developed by states over more than thirty years to create

²⁹ Hurrell, A. (1996). International society and the study of regimes: A reflective approach. In R.J. Beck, A.C. Arend & R.D. Vander Lugt (Eds.), *International rules: Approaches from international law and international relations* (pp. 206-226). New York: Oxford University Press. At p. 206.

³⁰ Keohane, R.O. (1997). International relations and international law: Two optics. *Harvard International Law Journal*, 38 (2), pp. 487-502. At p. 502.

and maintain the effectiveness of the black-letter international law of the NPT - the nuclear non-proliferation regime.³¹

Both international law and international political relations are dependent on a wide range of institutions, agreements, understandings, inter-governmental and non-governmental organisations which regulate international affairs, and extend their reach and operation far beyond the purely legal and closely delineated obligations contained on the face of international treaties.

One reason for the durability of the NPT regime is that it incorporates both the legal *and* political perspectives of international rules. Examples of this duality within international law of arms control and disarmament efforts can be seen in a wide range of multilateral United Nations treaties (such as the 1971 *Sea-Bed Treaty*),³² which contrast with many extra-legal institutions (such as the Nuclear Suppliers Group, introduced in 1978 to restrict the export of sensitive nuclear technologies).³³ These are only two examples, from many, of the components of the international nuclear non-proliferation regime.³⁴

As in many other areas of international affairs, the procedures and rules of international institutions and agreements in nuclear matters create structures of shared information which lower the "transaction costs" - the costs of making and enforcing agreements - to states of adhering to relevant international legal or extra-legal rules.³⁵ They do so by reinforcing the reciprocal practices which encourage governments to keep their own promises, in order to ensure that others keep theirs. The resulting

³¹ Abbott, K. W. (1992). International law and international relations theory: Building bridges - Elements of a joint discipline. *Proceedings of the 86th Annual Meeting of the American Society of International Law* (pp. 167-175). Washington, DC: American Society of International Law. At p. 168.

Keohane, R.O. (1998). International institutions: Can interdependence work? *Foreign Policy*, Spring 1998, pp. 82-94.

Van Leeuwen, M. (1995). *The future of the international nuclear non-proliferation regime*. Dordrecht: Martinus Nijhoff. At Introduction.

³² *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof*. (1971) [955 UNTS 115].

³³ *Nuclear Non-Proliferation Treaty [NPT] Chronology*. (2000). Federation of American Scientists. Available WWW: <http://www.fas.org/nuke/control/npt/chron.htm>

³⁴ A recent and comprehensive collection of essays which provide an overview of the international nuclear non-proliferation regime has been assembled by Thomas, R.G.C. (Ed.). (1998). *The nuclear non-proliferation regime: Prospects for the 21st century*. Houndmills: Macmillan.

³⁵ *Supra*. At Note 31 (Keohane). At p. 91.

environment of transparency is, in turn, likely to enhance certainty for states about the likely consequences of the obligations they undertake.³⁶

Furthermore, within this process states establish and define the nature of acceptable and legitimate principles, both within and beyond the boundaries of international law, which are available to resolve conflicts that may arise between them, and thereby help to establish states' expectations on any given issue.³⁷ For example, the International Atomic Energy Agency, over many years, has developed operational procedures and rules for the inspection of nuclear installations and materials in respect of its safeguard and verification activities. Those procedures are widely known and understood, and go far beyond the rights and responsibilities set forth in Article XII of the Agency's 1957 Statute.³⁸

In the case of the nuclear non-proliferation regime, the process of elaboration of its core treaty law has been enhanced by the complexity of the amendment mechanism in Articles VIII (1) and (2) of the NPT, which has resulted in the complete absence of any amendments to its terms over its thirty-three years of existence. The only practical alternative to formal amendments, now widely regarded as functionally impossible for a treaty instrument with almost universal adherence, has been the evolution of the NPT regime as a strategy for the interpretation and universal application of the terms of the treaty. It was significant for Australia's future status as an anti-nuclear activist that it took a leading role in seeking generally acceptable interpretations of the meaning of the new treaty's provisions (such as the term "manufacture ... of nuclear weapons" in Articles I and II) well before the treaty had been opened for signature.

³⁶ *Ibid.* At p. 86.

³⁷ *Ibid.*

³⁸ See Appendix III. The Agency's rights and responsibilities were extended and strengthened in 1997 through the development of a Model Protocol additional to its Safeguards Agreements with states, as a result of its failure to detect Iraq's clandestine nuclear weapons programme before the Second Gulf War of 1990/1991. *Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards*. INFCIRC/540, September 1997.

A Final Word

This study has demonstrated that the outcome of historically important questions is, with hindsight and access to comprehensive evidence, far less certain or predictable than the sweep and flow of events may suggest - even to observers closely aligned with the circumstances they describe. Outcomes which once seemed plausible and soundly based may turn out, on the basis of new knowledge, to have entirely different origins and implications. So it is with the story of Australia's divisive, ambivalent and potentially disastrous progress towards its ultimate conclusion that the threat or use of nuclear weapons is illegal in international law, would constitute a crime against humanity and must never happen.

The United States Government was surprised and perplexed to find, early in 1968, that Australia - a staunch ally for over twenty-five years - was not willing blindly to follow the US by acceding without demur to the NPT, an international instrument which promised to rein in the potential for widespread nuclear weapons diffusion.

The degree to which the Johnson Administration was aware of the domestic origins of that reluctance is open to conjecture in the absence of evidence in the Australian archival record. It is doubtful, for example, that those US representatives involved in negotiations with Australia over the new treaty were fully aware of the depth of antipathy which the Australian Atomic Energy Commission had displayed towards the NPT within the confidential deliberations of the Australian bureaucracy. Even the strength of influence exerted by individuals within Australia's political leadership - notably Prime Minister John Gorton, Minister for National Development David Fairbairn and Minister for External Affairs Paul Hasluck - over Australia's position is difficult to gauge with accuracy from the available documentary evidence.

Prime Minister Gorton was fortified in his view that Australia would renounce the nuclear weapons option at its peril by the support of his Minister for National Development. Nevertheless, Gorton ultimately had little choice but to allow Australia's accession to the NPT, albeit in a form which was hedged around with caveats and reservations. For his part, Minister for External Affairs Hasluck, through his lack of engagement with the nuclear question, echoed the wider ambivalence evident in Australia's search for nuclear policy coherence.

In the end, however, Australia's struggle to develop a clear position on nuclear weapons - one which could accommodate such domestic concerns as national defence, nuclear energy for industrial development and international trade in uranium - was successful. During the course of that struggle, it is doubtful whether any dispassionate observer could have predicted its outcome, much less the paradox of a middle-power ally of the United States which advanced a position contrary to the spirit and purpose of its alliance while remaining firmly within it.

It is therefore important to acknowledge that the outcome of international efforts as crucial to global peace as the negotiation of the 1968 *Nuclear Non-Proliferation Treaty* is often as dependent on the incidental convergence and interaction of disparate influences and agency as it is on the measured advance of diplomacy and statesmanship. As this study has shown, the assembly of coherence from the apparent chaos and instability of daily events demonstrates clearly that, in relations between nation-states, nothing should be taken for granted.

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APPENDIX I

The Avalon Project*at the Yale Law School***Charter of the United Nations; June 26, 1945**

Art 1	Art 2	Art 3	Art 4	Art 5	Art 6	Art 7	Art 8	Art 9	Art 10
Art 11	Art 12	Art 13	Art 14	Art 15	Art 16	Art 17	Art 18	Art 19	Art 20
Art 21	Art 22	Art 23	Art 24	Art 25	Art 26	Art 27	Art 28	Art 29	Art 30
Art 31	Art 32	Art 33	Art 34	Art 35	Art 36	Art 37	Art 38	Art 39	Art 40
Art 41	Art 42	Art 43	Art 44	Art 45	Art 46	Art 47	Art 48	Art 49	Art 50
Art 51	Art 52	Art 53	Art 54	Art 55	Art 56	Art 57	Art 58	Art 59	Art 60
Art 61	Art 62	Art 63	Art 64	Art 65	Art 66	Art 67	Art 68	Art 69	Art 70
Art 71	Art 72	Art 73	Art 74	Art 75	Art 76	Art 77	Art 78	Art 79	Art 80
Art 81	Art 82	Art 83	Art 84	Art 85	Art 86	Art 87	Art 88	Art 89	Art 90
Art 91	Art 92	Art 93	Art 94	Art 95	Art 96	Art 97	Art 98	Art 99	Art 100
Art 101	Art 102	Art 103	Art 104	Art 105	Art 106	Art 107	Art 108	Art 109	Art 110
Art 111									

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, HAVE RESOLED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due

form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to a of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and. justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner

inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under **Chapter VII**.

CHAPTER II

MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with **Article 110**.

Article 4

1. Membership in the United Nations is open to a other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER III

ORGANS

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV

THE GENERAL ASSEMBLY

Composition

Article 9

1. The General Assembly shall consist of all the Members of the United Nations.
2. Each Member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in **Article 12**, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.
2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with **Article 35**, paragraph 2, and, except as provided in **Article 12**, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.
4. The powers of the General Assembly set forth in this Article shall not limit the general scope of **Article 10**.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:
 - a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
 - b. promoting international co-operation in the economic, social, cultural, educational, and health fields, assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
2. The further responsibilities, functions and powers of the General with respect to matters

mentioned in paragraph) above are set forth in Chapters **IX** and **X**.

Article 14

Subject to the provisions of **Article 12**, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.
2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters **XII** and **XIII**, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.
2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.
3. The Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in **Article 57** and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18

1. Each member of the General Assembly shall have one vote.
2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the

non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the of the Member.

Procedure

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V

THE SECURITY COUNCIL

Composition

Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic

of China, France, the Union of Soviet Socialist , the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

Functions and Powers

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in **Article 47**, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Voting

Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under **Chapter VI**, and under paragraph 3 of **Article 52**, a party to a dispute shall abstain from voting.

Procedure

Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at times at the seat of the Organization.
2. The Security Council shall hold meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.
3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall any down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI

PACIFIC SETTLEMENT OF DISPUTES

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of a, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in **Article 34**, to the attention of the Security Council or of the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles **11** and **12**.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in **Article 33** fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in **Article 39**, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the

parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in **Article 41** would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member its work.
3. The Military Staff Committee be responsible under the Security Council for the strategic direction of any armed forces paced at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
4. The Military Staff Committee, with the authorization of the security Council and after consultation with appropriate regional agencies, may establish sub-commit- tees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out

the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Chapter VIII

REGIONAL ARRANGEMENTS

Article 52

1. Nothing in the present Charter the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4. This Article in no way the application of Articles 34 and 35.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or

agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to **Article 107** or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in **Article 55**.

Article 57

1. The various specialized agencies, established by intergovernmental agreement and having

wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of **Article 63**.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58

The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies.

Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in **Article 55**.

Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X

THE ECONOMIC AND SOCIAL COUNCIL

Composition

Article 61

1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other

members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

Functions and Powers

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in **Article 57**, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connexion with the carrying out of the recommendations of the General Assembly.
2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.
3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

Voting

Article 67

1. Each member of the Economic and Social Council shall have one vote.
2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may for the performance of its functions.

Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of

the specialized agencies.

Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XI

DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to co-operate

with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neigh-bourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII

INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in **Article 1** of the present Charter, shall be:

- a. to further international peace and security;
- b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- c. to encourage respect for human rights and for fundamental freedoms for all without : as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their , and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of **Article 80**.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

- a. territories now held under mandate;
- b. territories which may be detached from enemy states as a result of the Second World War; and
- c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trustee- ship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles **83** and **85**.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles **77**, **79**, and **81**, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other

territories under the trusteeship system as provided for in **Article 77**.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under **Article 43**.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in **Article 76** shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII

THE TRUSTEESHIP COUNCIL

Composition

Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:

- a. those Members administering trust territories;
- b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and
- c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

Functions and Powers

Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

- a. consider reports submitted by the administering authority;
- b. accept petitions and examine them in consultation with the administering authority;
- c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
- d. take these and other actions in conformity with the terms of the trusteeship agreements.

Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and

educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Voting

Article 89

1. Each member of the Trusteeship Council shall have one vote.
2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

Procedure

Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV

THE INTERNATIONAL COURT OF JUSTICE

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are *facto* parties to the Statute of the International Court of Justice.
2. A state which is not of the United Nations may become a party to the Statute of the

International Court of Justice on to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

CHAPTER XV

THE SECRETARIAT

Article 97

The Secretariat shall comprise a Secretary- General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the

Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might compromise their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI

MISCELLANEOUS PROVISIONS

Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or

agreement before any organ of the United Nations.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

CHAPTER XVII

TRANSITIONAL SECURITY ARRANGEMENTS

Article 106

Pending the coming into force of such special agreements referred to in **Article 43** as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under **Article 42**, the parties to the Four-Nation Declaration, signed at **Moscow, 30 October 1943**, and France, shall, in accordance with the provisions of **paragraph 5** of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

CHAPTER XVIII

AMENDMENTS

Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

CHAPTER XIX

RATIFICATION AND SIGNATURE

Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The shall be deposited with the Government of the United States of America, which shall notify a the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of by the Republic of China,

France, the Union of Soviet Socialist, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

Article 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

Source:

A Decade of American Foreign Policy : Basic Documents, 1941-49
Prepared at the request of the Senate Committee on Foreign Relations
By the Staff of the Committee and the Department of State.
Washington, DC : Government Printing Office, 1950

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United Nations Page

Decade of American Foreign Policy

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*The Avalon Project : United Nations Charter; June 26, 1945 was last modified on: Thursday,
January 01, 1970 08:00:00*

APPENDIX II

TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

The States concluding this Treaty, hereinafter referred to as the "Parties to the Treaty",

Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,

Believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war,

In conformity with resolutions of the United Nations General Assembly calling for the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons,

Undertaking to co-operate in facilitating the application of International Atomic Energy Agency safeguards on peaceful nuclear activities,

Expressing their support for research, development and other efforts to further the application, within the framework of the International Atomic Energy Agency safeguards system, of the principle of safeguarding effectively the flow of source and special fissionable materials by use of instruments and other techniques at certain strategic points,

Affirming the principle that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States,

Convinced that, in furtherance of this principle, all Parties to the Treaty are entitled to participate in the fullest possible exchange of scientific information for, and to contribute alone or in co-operation with other States to, the further development of the applications of atomic energy for peaceful purposes,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,

Urging the co-operation of all States in the attainment of this objective,

Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end,

Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control,

Recalling that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and

security are to be promoted with the least diversion for armaments of the world's human and economic resources,

Have agreed as follows:

Article I

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

Article II

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

Article III

1. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.

2. Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.

3. The safeguards required by this Article shall be implemented in a manner designed to comply with Article IV of this Treaty, and to avoid hampering the economic or technological development of the Parties or international co-operation in the field of peaceful nuclear activities, including the international exchange of nuclear material and equipment for the processing, use or production of nuclear material for peaceful purposes in accordance with the provisions of this Article and the principle of safeguarding set forth in the Preamble of the Treaty.

4. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article either individually

or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing their instruments of ratification or accession after the 180-day period, negotiation of such agreements shall commence not later than the date of such deposit. Such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations.

Article IV

1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also co-operate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.

Article V

Each Party to the Treaty undertakes to take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development. Non-nuclear-weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a special international agreement or agreements, through an appropriate international body with adequate representation of non-nuclear-weapon States. Negotiations on this subject shall commence as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.

Article VI

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Article VII

Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.

Article VIII

1. Any Party to the Treaty may propose amendments to this Treaty. The text of any proposed amendment shall be submitted to the Depositary Governments which shall circulate it to all Parties to the Treaty. Thereupon, if requested to do so by one-third or more of the Parties to

the Treaty, the Depositary Governments shall convene a conference, to which they shall invite all the Parties to the Treaty, to consider such an amendment.

2. Any amendment to this Treaty must be approved by a majority of the votes of all the Parties to the Treaty, including the votes of all nuclear-weapon States Party to the Treaty and all other Parties which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency. The amendment shall enter into force for each Party that deposits its instrument of ratification of the amendment upon the deposit of such instruments of ratification by a majority of all the Parties, including the instruments of ratification of all nuclear-weapon States Party to the Treaty and all other Parties which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency. Thereafter, it shall enter into force for any other Party upon the deposit of its instrument of ratification of the amendment.

3. Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held in Geneva, Switzerland, in order to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised. At intervals of five years thereafter, a majority of the Parties to the Treaty may obtain, by submitting a proposal to this effect to the Depositary Governments, the convening of further conferences with the same objective of reviewing the operation of the Treaty.

Article IX

1. This Treaty shall be open to all States for signature. Any State which does not sign the Treaty before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depositary Governments.

3. This Treaty shall enter into force after its ratification by the States, the Governments of which are designated Depositaries of the Treaty, and forty other States signatory to this Treaty and the deposit of their instruments of ratification. For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or of accession, the date of the entry into force of this Treaty, and the date of receipt of any requests for convening a conference or other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

Article X

1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

2. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.

Article XI

This Treaty, the English, Russian, French, Spanish and Chinese texts of which are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Treaty shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed this Treaty.

DONE in triplicate, at the cities of London, Moscow and Washington, the first day of July, one thousand nine hundred and sixty-eight.

Entered into force: 5 March 1970. Source: U.N.T.S. No. 10485, vol. 729, pp. 169-175.

APPENDIX III



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DEPARTMENT OF EXTERNAL AFFAIRS

CANBERRA

Statute of the International Atomic Energy Agency [IAEA]

(New York, 26 October 1956)

Entry into force for Australia and generally: 29 July 1957

(except Annex: 26 October 1956)

AUSTRALIAN TREATY SERIES

1957 No. 11

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STATUTE OF THE INTERNATIONAL ATOMIC ENERGY AGENCY

Article I

Establishment of the Agency

The Parties hereto establish an International Atomic Energy Agency (hereinafter referred to as "the Agency") upon the terms and conditions hereinafter set forth.

Article II

Objectives

The Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.

Article III

Functions

A. The Agency is authorized:

1. To encourage and assist research on, and development and practical application of, atomic energy for peaceful uses throughout the world; and, if requested to do so, to act as an intermediary for the purposes of securing the performance of services or the supplying of materials, equipment, or facilities by one member of the Agency for another; and to perform any operation or service useful in research on, or development or practical application of, atomic energy for peaceful purposes;
2. To make provision, in accordance with this Statute, for materials, services, equipment, and facilities to meet the needs of research on, and development and practical application of, atomic energy for peaceful purposes, including the production of electric power, with due consideration for the needs of the under-developed areas of the world;
3. To foster the exchange of scientific and technical information on peaceful uses of atomic energy;
4. To encourage the exchange and training of scientists and experts in the field of peaceful uses of atomic energy;
5. To establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy;
6. To establish or adopt, in consultation and, where appropriate, in collaboration with the competent organs of the United Nations and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions), and to provide for the application of these standards to its own operations as well as to the operations making use of materials, services, equipment, facilities, and information made available by the Agency or at its request or under its control or supervision; and to provide for the application of these standards, at the request of the parties, to operations under any bilateral or multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy;
7. To acquire or establish any facilities, plant and equipment useful in carrying out its authorized functions, whenever the facilities, plant, and equipment otherwise available to it in the area concerned are inadequate or available only on terms it deems unsatisfactory.

B. In carrying out its functions, the Agency shall:

1. Conduct its activities in accordance with the purposes and principles of the United Nations to promote peace and international cooperation, and in conformity with policies of the United Nations furthering the establishment of safeguarded world-wide disarmament and in

conformity with any international agreements entered into pursuant to such policies;

2. Establish control over the use of special fissionable materials received by the Agency, in order to ensure that these materials are used only for peaceful purposes;

3. Allocate its resources in such a manner as to secure efficient utilization and the greatest possible general benefit in all areas of the world, bearing in mind the special needs of the under-developed areas of the world;

4. Submit reports on its activities annually to the General Assembly of the United Nations, and, when appropriate, to the Security Council: if in connexion with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security, and may also take the measures open to it under this Statute, including those provided in paragraph C of Article XII;

5. Submit reports to the Economic and Social Council and other organs of the United Nations on matters within the competence of those organs.

C. In carrying out its functions, the Agency shall not make assistance to members subject to any political, economic, military, or other conditions incompatible with the provisions of this Statute.

D. Subject to the provisions of this Statute and to the terms of agreements concluded between a State or a group of States and the Agency which shall be in accordance with the provisions of the Statute, the activities of the Agency shall be carried out with due observance of the sovereign rights of States.

Article IV

Membership

A. The initial members of the Agency shall be those States Members of the United Nations or of any of the specialized agencies which shall have signed this Statute within ninety days after it is opened for signature and shall have deposited an instrument of ratification.

B. Other members of the Agency shall be those States, whether or not Members of the United Nations or of any of the specialized agencies, which deposit an instrument of acceptance of this Statute after their membership has been approved by the General Conference upon the recommendation of the Board of Governors. In recommending and approving a State for membership, the Board of Governors and the General Conference shall determine that the State is able and willing to carry out the obligations of membership in the Agency, giving due consideration to its ability and willingness to act in accordance with the purposes and principles of the Charter of the United Nations.

C. The Agency is based on the principle of the sovereign equality of all its members, and all members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with this Statute.

Article V

General Conference

- A. A General Conference consisting of representatives of all members shall meet in regular annual session and in such special sessions as shall be convened by the Director General at the request of the Board of Governors or of a majority of members. The sessions shall take place at the headquarters of the Agency unless otherwise determined by the General Conference.
- B. At such sessions, each member shall be represented by one delegate who may be accompanied by alternates and by advisers. The cost of attendance of any delegation shall be borne by the member concerned.
- C. The General Conference shall elect a President and such other officers as may be required at the beginning of each session. They shall hold office for the duration of the session. The General Conference, subject to the provisions of this Statute, shall adopt its own rules of procedure. Each member shall have one vote. Decisions pursuant to paragraph H of Article XIV, paragraph C of Article XVIII and paragraph B of Article XIX shall be made by a two-thirds majority of the members present and voting. Decisions on other questions, including the determination of additional questions or categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting. A majority of members shall constitute a quorum.
- D. The General Conference may discuss any questions or any matters within the scope of this Statute or relating to the powers and functions of any organs provided for in this Statute, and may make recommendations to the membership of the Agency or to the Board of Governors or to both on any such questions or matters.
- E. The General Conference shall:
1. Elect members of the Board of Governors in accordance with Article VI;
 2. Approve States for membership in accordance with Article IV;
 3. Suspend a member from the privileges and rights of membership in accordance with Article XIX;
 4. Consider the annual report of the Board;
 5. In accordance with Article XIV, approve the budget of the Agency recommended by the Board or return it with recommendations as to its entirety or parts to the Board, for resubmission to the General Conference;
 6. Approve reports to be submitted to the United Nations as required by the relationship agreement between the Agency and the United Nations, except reports referred to in paragraph C of Article XII, or return them to the Board with its recommendations;
 7. Approve any agreement or agreements between the Agency and the United Nations and other organizations as provided in Article XVI or return such agreements with its recommendations to the Board, for resubmission to the General Conference;

8. Approve rules and limitations regarding the exercise of borrowing powers by the Board, in accordance with paragraph G of Article XIV; approve rules regarding the acceptance of voluntary contributions to the Agency; and approve, in accordance with paragraph F of Article XIV, the manner in which the general fund referred to in that paragraph may be used;
9. Approve amendments to this Statute in accordance with paragraph C of Article XVIII;
10. Approve the appointment of the Director General in accordance with paragraph A of Article VII.

F. The General Conference shall have the authority:

1. To take decisions on any matter specifically referred to the General Conference for this purpose by the Board;
2. To propose matters for consideration by the Board and request from the Board reports on any matter relating to the functions of the Agency.

Article VI

Board of Governors

A. The Board of Governors shall be composed as follows:

1. The outgoing Board of Governors (or in the case of the first Board, the Preparatory Commission referred to in Annex I) shall designate for membership on the Board the five members most advanced in the technology of atomic energy including the production of source materials and the member most advanced in the technology of atomic energy including the production of source materials in each of the following areas not represented by the aforesaid five:

- (1) North America
- (2) Latin America
- (3) Western Europe
- (4) Eastern Europe
- (5) Africa and the Middle East
- (6) South Asia
- (7) South East Asia and the Pacific
- (8) Far East.

2. The outgoing Board of Governors (or in the case of the first Board, the Preparatory Commission referred to in Annex I) shall designate for membership on the Board two members from among the following other producers of source materials: Belgium, Czechoslovakia, Poland, and Portugal; and shall also designate for membership on the Board

one other member as a supplier of technical assistance. No member in this category in any one year will be eligible for redesignation in the same category for the following year.

3. The General Conference shall elect ten members to membership on the Board of Governors, with due regard to equitable representation on the Board as a whole of the members in the areas listed in sub-paragraph A-1 of this Article, so that the Board shall at all times include in this category a representative of each of those areas except North America. Except for the five members chosen for a term of one year in accordance with paragraph D of this Article, no member in this category in any one term of office will be eligible for re-election in the same category for the following term of office.

B. The designations provided for in sub-paragraphs A-1 and A-2 of this Article shall take place not less than sixty days before each regular annual session of the General Conference. The elections provided for in sub-paragraph A-3 of this Article shall take place at regular annual sessions of the General Conference.

C. Members represented on the Board of Governors in accordance with sub-paragraphs A-1 and A-2 of this Article shall hold office from the end of the next regular annual session of the General Conference after their designation until the end of the following regular annual session of the General Conference.

D. Members represented on the Board of Governors in accordance with sub-paragraph A-3 of this Article shall hold office from the end of the regular annual session of the General Conference at which they are elected until the end of the second regular annual session of the General Conference thereafter. In the election of these members for the first Board, however, five shall be chosen for a term of one year.

E. Each member of the Board of Governors shall have one vote. Decisions on the amount of the Agency's budget shall be made by a two-thirds majority of those present and voting, as provided in paragraph H of Article XIV. Decisions on other questions, including the determination of additional questions or categories of questions to be decided by a two-thirds majority, shall be made by a majority of those present and voting. Two-thirds of all members of the Board shall constitute a quorum.

F. The Board of Governors shall have authority to carry out the functions of the Agency in accordance with this Statute, subject to its responsibilities to the General Conference as provided in this Statute.

G. The Board of Governors shall meet at such times as it may determine. The meetings shall take place at the headquarters of the Agency unless otherwise determined by the Board.

H. The Board of Governors shall elect a Chairman and other officers from among its members and, subject to the provisions of this Statute, shall adopt its own rules of procedure.

I. The Board of Governors may establish such committees as it deems advisable. The Board may appoint persons to represent it in its relations with other organizations.

J. The Board of Governors shall prepare an annual report to the General Conference concerning the affairs of the Agency and any projects approved by the Agency. The Board shall also prepare for submission to the General Conference such reports as the Agency is or may be required to make to the United Nations or to any other organization the work of

which is related to that of the Agency. These reports, along with the annual reports, shall be submitted to members of the Agency at least one month before the regular annual session of the General Conference.

Article VII

Staff

A. The staff of the Agency shall be headed by a Director General. The Director General shall be appointed by the Board of Governors with the approval of the General Conference for a term of four years. He shall be the chief administrative officer of the Agency.

B. The Director General shall be responsible for the appointment, organization, and functioning of the staff and shall be under the authority of and subject to the control of the Board of Governors. He shall perform his duties in accordance with regulations adopted by the Board.

C. The staff shall include such qualified scientific and technical and other personnel as may be required to fulfil the objectives and functions of the Agency. The Agency shall be guided by the principle that its permanent staff shall be kept to a minimum.

D. The paramount consideration in the recruitment and employment of the staff and in the determination of the conditions of service shall be to secure employees of the highest standards of efficiency, technical competence, and integrity. Subject to this consideration, due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible.

E. The terms and conditions on which the staff shall be appointed, remunerated, and dismissed shall be in accordance with regulations made by the Board of Governors, subject to the provisions of this Statute and to general rules approved by the General Conference on the recommendation of the Board.

F. In the performance of their duties, the Director General and the staff shall not seek or receive instructions from any source external to the Agency. They shall refrain from any action which might reflect on their position as officials of the Agency; subject to their responsibilities to the Agency, they shall not disclose any industrial secret or other confidential information coming to their knowledge by reason of their official duties for the Agency. Each member undertakes to respect the international character of the responsibilities of the Director General and the staff and shall not seek to influence them in the discharge of their duties.

G. In this Article the term "staff" includes guards.

Article VIII

Exchange of information

A. Each member should make available such information as would, in the judgement of the member, be helpful to the Agency.

B. Each member shall make available to the Agency all scientific information developed as a

result of assistance extended by the Agency pursuant to Article XI.

C. The Agency shall assemble and make available in an accessible form the information made available to it under paragraphs A and B of this Article. It shall take positive steps to encourage the exchange among its members of information relating to the nature and peaceful uses of atomic energy and shall serve as an intermediary among its members for this purpose.

Article IX

Supplying of materials

A. Members may make available to the Agency such quantities of special fissionable materials as they deem advisable and on such terms as shall be agreed with the Agency. The materials made available to the Agency may, at the discretion of the member making them available, be stored either by the member concerned or, with the agreement of the Agency, in the Agency's depots.

B. Members may also make available to the Agency source materials as defined in Article XX and other materials. The Board of Governors shall determine the quantities of such materials which the Agency will accept under agreements provided for in Article XIII.

C. Each member shall notify the Agency of the quantities, form, and composition of special fissionable materials, source materials, and other materials which that member is prepared, in conformity with its laws, to make available immediately or during a period specified by the Board of Governors.

D. On request of the Agency a member shall, from the materials which it has made available, without delay deliver to another member or group of members such quantities of such materials as the Agency may specify, and shall without delay deliver to the Agency itself such quantities of such materials as are really necessary for operations and scientific research in the facilities of the Agency.

E. The quantities, form and composition of materials made available by any member may be changed at any time by the member with the approval of the Board of Governors.

F. An initial notification in accordance with paragraph C of this Article shall be made within three months of the entry into force of this Statute with respect to the member concerned. In the absence of a contrary decision of the Board of Governors, the materials initially made available shall be for the period of the calendar year succeeding the year when this Statute takes effect with respect to the member concerned. Subsequent notifications shall likewise, in the absence of a contrary action by the Board, relate to the period of the calendar year following the notification and shall be made no later than the first day of November of each year.

G. The Agency shall specify the place and method of delivery and, where appropriate, the form and composition, of materials which it has requested a member to deliver from the amounts which that member has notified the Agency it is prepared to make available. The Agency shall also verify the quantities of materials delivered and shall report those quantities periodically to the members.

H. The Agency shall be responsible for storing and protecting materials in its possession. The Agency shall ensure that these materials shall be safeguarded against (1) hazards of the weather, (2) unauthorized removal or diversion, (3) damage or destruction, including sabotage, and (4) forcible seizure. In storing special fissionable materials in its possession, the Agency shall ensure the geographical distribution of these materials in such a way as not to allow concentration of large amounts of such materials in any one country or region of the world.

I. The Agency shall as soon as practicable establish or acquire such of the following as may be necessary:

1. Plant, equipment and facilities for the receipt, storage, and issue of materials;
2. Physical safeguards;
3. Adequate health and safety measures;
4. Control laboratories for the analysis and verification of materials received;
5. Housing and administrative facilities for any staff required for the foregoing.

J. The materials made available pursuant to this Article shall be used as determined by the Board of Governors in accordance with the provisions of this Statute. No member shall have the right to require that the materials it makes available to the Agency be kept separately by the Agency or to designate the specific project in which they must be used.

Article X

Services, equipment and facilities

Members may make available to the Agency services, equipment, and facilities which may be of assistance in fulfilling the Agency's objectives and functions.

Article XI

Agency projects

A. Any member or group of members of the Agency desiring to set up any project for research on, or development or practical application of, atomic energy for peaceful purposes may request the assistance of the Agency in securing special fissionable and other materials, services, equipment, and facilities necessary for this purpose. Any such request shall be accompanied by an explanation of the purpose and extent of the project and shall be considered by the Board of Governors.

B. Upon request, the Agency may also assist any member or group of members to make arrangements to secure necessary financing from outside sources to carry out such projects. In extending this assistance, the Agency will not be required to provide any guarantees or to assume any financial responsibility for the project.

C. The Agency may arrange for the supplying of any materials, services, equipment, and facilities necessary for the project by one or more members or may itself undertake to

provide any or all of these directly, taking into consideration the wishes of the member or members making the request.

D. For the purpose of considering the request, the Agency may send into the territory of the member or group of members making the request a person or persons qualified to examine the project. For this purpose the Agency may, with the approval of the member or group of members making the request, use members of its own staff or employ suitably qualified nationals of any member.

E. Before approving a project under this Article, the Board of Governors shall give due consideration to:

1. The usefulness of the project, including its scientific and technical feasibility;
2. The adequacy of plans, funds, and technical personnel to assure the effective execution of the project;
3. The adequacy of proposed health and safety standards for handling and storing materials and for operating facilities;
4. The inability of the member or group of members making the request to secure the necessary finances, materials, facilities, equipment, and services;
5. The equitable distribution of materials and other resources available to the Agency;
6. The special needs of the under-developed areas of the world; and
7. Such other matters as may be relevant.

F. Upon approving a project, the Agency shall enter into an agreement with the member or group of members submitting the project, which agreement shall:

1. Provide for allocation to the project of any required special fissionable or other materials;
2. Provide for transfer of special fissionable materials from their then place of custody, whether the materials be in the custody of the Agency or of the member making them available for use in Agency projects, to the member or group of members submitting the project, under conditions which ensure the safety of any shipment required and meet applicable health and safety standards;
3. Set forth the terms and conditions, including charges, on which any materials, services, equipment, and facilities are to be provided by the Agency itself, and, if any such materials, services, equipment, and facilities are to be provided by a member, the terms and conditions as arranged for by the member or group of members submitting the project and the supplying member;
4. Include undertakings by the member or group of members submitting the project: (a) that the assistance provided shall not be used in such a way as to further any military purpose; and (b) that the project shall be subject to the safeguards provided for in Article XII, the relevant safeguards being specified in the agreement;

5. Make appropriate provision regarding the rights and interests of the Agency and the member or members concerned in any inventions or discoveries, or any patents therein, arising from the project;

6. Make appropriate provision regarding settlement of disputes;

7. Include such other provisions as may be appropriate.

G. The provisions of this Article shall also apply where appropriate to a request for materials, services, facilities, or equipment in connexion with an existing project.

Article XII

Agency safeguards

A. With respect to any Agency project, or other arrangement where the Agency is requested by the parties concerned to apply safeguards, the Agency shall have the following rights and responsibilities to the extent relevant to the project or arrangement:

1. To examine the design of specialized equipment and facilities, including nuclear reactors, and to approve it only from the viewpoint of assuring that it will not further any military purpose, that it complies with applicable health and safety standards, and that it will permit effective application of the safeguards provided for in this Article;

2. To require the observance of any health and safety measures prescribed by the Agency;

3. To require the maintenance and production of operating records to assist in ensuring accountability for source and special fissionable materials used or produced in the project or arrangement;

4. To call for and receive progress reports;

5. To approve the means to be used for the chemical processing of irradiated materials solely to ensure that this chemical processing will not lend itself to diversion of materials for military purposes and will comply with applicable health and safety standards; to require that special fissionable materials recovered or produced as a by-product be used for peaceful purposes under continuing Agency safeguards for research or in reactors, existing or under construction, specified by the member or members concerned; and to require deposit with the Agency of any excess of any special fissionable materials recovered or produced as a by-product over what is needed for the above-stated uses in order to prevent stockpiling of these materials, provided that thereafter at the request of the member or members concerned special fissionable materials so deposited with the Agency shall be returned promptly to the member or members concerned for use under the same provisions as stated above;

6. To send into the territory of the recipient State or States inspectors, designated by the Agency after consultation with the State or States concerned, who shall have access at all times to all places and data and to any person who by reason of his occupation deals with materials, equipment, or facilities which are required by this Statute to be safeguarded, as necessary to account for source and special fissionable materials supplied and fissionable products and to determine whether there is compliance with the undertaking against use in

furtherance of any military purpose referred to in sub-paragraph F-4 of Article XI, with the health and safety measures referred to in sub-paragraph A-2 of this Article, and with any other conditions prescribed in the agreement between the Agency and the State or States concerned. Inspectors designated by the Agency shall be accompanied by representatives of the authorities of the State concerned, if that State so requests, provided that the inspectors shall not thereby be delayed or otherwise impeded in the exercise of their functions;

7. In the event of non-compliance and failure by the recipient State or States to take requested corrective steps within a reasonable time, to suspend or terminate assistance and withdraw any materials and equipment made available by the Agency or a member in furtherance of the project.

B. The Agency shall, as necessary, establish a staff of inspectors. The staff of inspectors shall have the responsibility of examining all operations conducted by the Agency itself to determine whether the Agency is complying with the health and safety measures prescribed by it for application to projects subject to its approval, supervision or control, and whether the Agency is taking adequate measures to prevent the source and special fissionable materials in its custody or used or produced in its own operations from being used in furtherance of any military purpose. The Agency shall take remedial action forthwith to correct any non-compliance or failure to take adequate measures.

C. The staff of inspectors shall also have the responsibility of obtaining and verifying the accounting referred to in sub-paragraph A-6 of this Article and of determining whether there is compliance with the undertaking referred to in sub-paragraph F-4 of Article XI, with the measures referred to in sub-paragraph A-2 of this Article, and with all other conditions of the project prescribed in the agreement between the Agency and the State or States concerned. The inspectors shall report any non-compliance to the Director General who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient State or States to remedy forthwith any non-compliance which it finds to have occurred. The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations. In the event of failure of the recipient State or States to take fully corrective action within a reasonable time, the Board may take one or both of the following measures: direct curtailment or suspension of assistance being provided by the Agency or by a member, and call for the return of materials and equipment made available to the recipient member or group of members. The Agency may also, in accordance with Article XIX, suspend any non-complying member from the exercise of the privileges and rights of membership.

Article XIII

Reimbursement of members

Unless otherwise agreed upon between the Board of Governors and the member furnishing to the Agency materials, services, equipment, or facilities, the Board shall enter into an agreement with such member providing for reimbursement for the items furnished.

Article XIV

Finance

A. The Board of Governors shall submit to the General Conference the annual budget

estimates for the expenses of the Agency. To facilitate the work of the Board in this regard, the Director General shall initially prepare the budget estimates. If the General Conference does not approve the estimates, it shall return them together with its recommendations to the Board. The Board shall then submit further estimates to the General Conference for its approval.

B. Expenditures of the Agency shall be classified under the following categories:

1. Administrative expenses: these shall include:

(a) Costs of the staff of the Agency other than the staff employed in connexion with materials, services, equipment, and facilities referred to in sub-paragraph B-2 below; costs of meetings; and expenditures required for the preparation of Agency projects and for the distribution of information;

(b) Costs of implementing the safeguards referred to in Article XII in relation to agency projects or, under sub-paragraph A-5 of Article III, in relation to any bilateral or multilateral arrangement, together with the costs of handling and storage of special fissionable material by the Agency other than the storage and handling charges referred to in paragraph E below;

2. Expenses, other than those included in sub-paragraph 1 of this paragraph, in connexion with any materials, facilities, plant, and equipment acquired or established by the Agency in carrying out its authorized functions, and the costs of materials, services, equipment, and facilities provided by it under agreements with one or more members.

C. In fixing the expenditures under sub-paragraph B-1(b) above, the Board of Governors shall deduct such amounts as are recoverable under agreements regarding the application of safeguards between the Agency and parties to bilateral or multilateral arrangements.

D. The Board of Governors shall apportion the expenses referred to in sub-paragraph B-1 above, among members in accordance with a scale to be fixed by the General Conference. In fixing the scale the General Conference shall be guided by the principles adopted by the United Nations in assessing contributions of Member States to the regular budget of the United Nations.

E. The Board of Governors shall establish periodically a scale of charges, including reasonable uniform storage and handling charges, for materials, services, equipment, and facilities furnished to members by the Agency. The scale shall be designed to produce revenues for the Agency adequate to meet the expenses and costs referred to in sub-paragraph B-2 above, less any voluntary contributions which the Board of Governors may, in accordance with paragraph F, apply for this purpose. The proceeds of such charges shall be placed in a separate fund which shall be used to pay members for any materials, services, equipment, or facilities furnished by them and to meet other expenses referred to in sub-paragraph B-2 above which may be incurred by the Agency itself.

F. Any excess of revenues referred to in paragraph E over the expenses and costs there referred to, and any voluntary contributions to the Agency, shall be placed in a general fund which may be used as the Board of Governors, with the approval of the General Conference, may determine.

G. Subject to rules and limitations approved by the General Conference, the Board of

Governors shall have the authority to exercise borrowing powers on behalf of the Agency without, however, imposing on members of the Agency any liability in respect of loans entered into pursuant to this authority, and to accept voluntary contributions made to the Agency.

H. Decisions of the General Conference on financial questions and of the Board of Governors on the amount of the Agency's budget shall require a two-thirds majority of those present and voting.

Article XV

Privileges and immunities

A. The Agency shall enjoy in the territory of each member such legal capacity and such privileges and immunities as are necessary for the exercise of its functions.

B. Delegates of members together with their alternates and advisers, Governors appointed to the Board together with their alternates and advisers, and the Director General and the staff of the Agency, shall enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connexion with the Agency.

C. The legal capacity, privileges, and immunities referred to in this Article shall be defined in a separate agreement or agreements between the Agency, represented for this purpose by the Director General acting under instructions of the Board of Governors, and the members.

Article XVI

Relationship with other organizations

A. The Board of Governors, with the approval of the General Conference, is authorized to enter into an agreement or agreements establishing an appropriate relationship between the Agency and the United Nations and any other organizations the work of which is related to that of the Agency.

B. The agreement or agreements establishing the relationship of the Agency and the United Nations shall provide for:

1. Submission by the Agency of reports as provided for in sub-paragraphs B-4 and B-5 of Article III;
2. Consideration by the Agency of resolutions relating to it adopted by the General Assembly or any of the Councils of the United Nations and the submission of reports, when requested, to the appropriate organ of the United Nations on the action taken by the Agency or by its members in accordance with this Statute as a result of such consideration.

Article XVII

Settlement of disputes

A. Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity

with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

B. The General Conference and the Board of Governors are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities.

Article XVIII

Amendments and withdrawals

A. Amendments to this Statute may be proposed by any member. Certified copies of the text of any amendment proposed shall be prepared by the Director General and communicated by him to all members at least ninety days in advance of its consideration by the General Conference.

B. At the fifth annual session of the General Conference following the coming into force of this Statute, the question of a general review of the provisions of this Statute shall be placed on the agenda of that session. On approval by a majority of the members present and voting, the review will take place at the following General Conference. Thereafter, proposals on the question of a general review of this Statute may be submitted for decision by the General Conference under the same procedure.

C. Amendments shall come into force for all members when:

(i) Approved by the General Conference by a two-thirds majority of those present and voting after consideration of observations submitted by the Board of Governors on each proposed amendment, and

(ii) Accepted by two-thirds of all the members in accordance with their respective constitutional processes. Acceptance by a member shall be effected by the deposit of an instrument of acceptance with the depositary Government referred to in paragraph C of Article XXI.

D. At any time after five years from the date when this Statute shall take effect in accordance with paragraph E of Article XXI or whenever a member is unwilling to accept an amendment to this Statute, it may withdraw from the Agency by notice in writing to that effect given to the depositary Government referred to in paragraph C of Article XXI, which shall promptly inform the Board of Governors and all members.

E. Withdrawal by a member from the Agency shall not affect its contractual obligations entered into pursuant to Article XI or its budgetary obligations for the year in which it withdraws.

Article XIX

Suspension of privileges

A. A member of the Agency which is in arrears in the payment of its financial contributions to the Agency shall have no vote in the Agency if the amount of its arrears equals or exceeds

the amount of the contributions due from it for the preceding two years. The General Conference may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

B. A member which has persistently violated the provisions of this Statute or of any agreement entered into by it pursuant to this Statute may be suspended from the exercise of the privileges and rights of membership by the General Conference acting by a two-thirds majority of the members present and voting upon recommendation by the Board of Governors.

Article XX

Definitions

As used in this Statute:

1. The term "special fissionable material" means plutonium-239; uranium-233; uranium enriched in the isotopes 235 or 233; any material containing one or more of the foregoing; and such other fissionable material as the Board of Governors shall from time to time determine; but the term "special fissionable material" does not include source material.

2. The term "uranium enriched in the isotopes 235 or 233" means uranium containing the isotopes 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.

3. The term "source material" means uranium containing the mixture of isotopes occurring, in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or concentrate; any other material containing one or more of the foregoing in such concentration as the Board of Governors shall from time to time determine; and such other material as the Board of Governors shall from time to time determine.

Article XXI

Signature, acceptance, and entry into force

A. This Statute shall be open for signature on 26 October 1956 by all States Members of the United Nations or of any of the specialized agencies and shall remain open for signature by those States for a period of ninety days.^[1]

B. The signatory States shall become parties to this Statute by deposit of an instrument of ratification.^[2]

C. Instruments of ratification by signatory States and instruments of acceptance by States whose membership has been approved under paragraph B of Article IV of this Statute shall be deposited with the Government of the United States of America, hereby designated as depositary Government.

D. Ratification or acceptance of this Statute shall be effected by States in accordance with their respective constitutional processes.

E. This Statute, apart from the Annex, shall come into force when eighteen States have deposited instruments of ratification in accordance with paragraph B of this Article, provided that such eighteen States shall include at least three of the following States: Canada, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.[3] Instruments of ratification and instruments of acceptance deposited thereafter shall take effect on the date of their receipt.

F. The depositary Government shall promptly inform all States signatory to this Statute of the date of each deposit of ratification and the date of entry into force of the Statute. The depositary Government shall promptly inform all signatories and members of the dates on which States subsequently become parties thereto.

G. The Annex to this Statute shall come into force on the first day this Statute is open for signature.

Article XXII

Registration with the United Nations

A. This Statute shall be registered by the depositary Government pursuant to Article 102 of the Charter of the United Nations.

B. Agreements between the Agency and any member or members, agreements between the Agency and any other organization or organizations, and agreements between members subject to approval of the Agency, shall be registered with the Agency. Such agreements shall be registered by the Agency with the United Nations if registration is required under Article 102 of the Charter of the United Nations.

Article XXIII

Authentic texts and certified copies

This Statute, done in the Chinese, English, French, Russian and Spanish languages, each being equally authentic, shall be deposited in the archives of the depositary Government. Duly certified copies of this Statute shall be transmitted by the depositary Government to the Governments of the other signatory States and to the Governments of States admitted to membership under paragraph B of Article IV.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed this Statute.

DONE at the Headquarters of the United Nations, this twenty-sixth day of October, one thousand nine hundred and fifty-six.

[Signatures not reproduced here.]

ANNEX I

PREPARATORY COMMISSION

A. A Preparatory Commission shall come into existence on the first day this Statute is open

for signature. It shall be composed of one representative each of Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Portugal, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America, and one representative each of six other States to be chosen by the International Conference on the Statute of the International Atomic Energy Agency. The Preparatory Commission shall remain in existence until this Statute comes into force and thereafter until the General Conference has convened and a Board of Governors has been selected in accordance with Article VI.

B. The expenses of the Preparatory Commission may be met by a loan provided by the United Nations and for this purpose the Preparatory Commission shall make the necessary arrangements with the appropriate authorities of the United Nations, including arrangements for repayment of the loan by the Agency. Should these funds be insufficient, the Preparatory Commission may accept advances from Governments. Such advances may be set off against the contributions of the Governments concerned to the Agency.

C. The Preparatory Commission shall:

1. Elect its own officers, adopt its own rules of procedure, meet as often as necessary, determine its own place of meeting and establish such committees as it deems necessary;
2. Appoint an executive secretary and staff as shall be necessary, who shall exercise such powers and perform such duties as the Commission may determine;
3. Make arrangements for the first session of the General Conference, including the preparation of a provisional agenda and draft rules of procedure, such session to be held as soon as possible after the entry into force of this Statute;
4. Make designations for membership on the first Board of Governors in accordance with sub-paragraphs A-1 and A-2 and paragraph B of Article VI;
5. Make studies, reports, and recommendations for the first session of the General Conference and for the first meeting of the Board of Governors on subjects of concern to the Agency requiring immediate attention, including (a) the financing of the Agency; (b) the programmes and budget for the first year of the Agency; (c) technical problems relevant to advance planning of Agency operations; (d) the establishment of a permanent Agency staff; and (e) the location of the permanent headquarters of the Agency;
6. Make recommendations for the first meeting of the Board of Governors concerning the provisions of a headquarters agreement defining the status of the Agency and the rights and obligations which will exist in the relationship between the Agency and the host Government;
7. (a) Enter into negotiations with the United Nations with a view to the preparation of a draft agreement in accordance with Article XVI of this Statute, such draft agreement to be submitted to the first session of the General Conference and to the first meeting of the Board of Governors; and

(b) make recommendations to the first session of the General Conference and to the first meeting of the Board of Governors concerning the relationship of the Agency to other international organizations as contemplated in Article XVI of this Statute.

[1] Signed for Australia 4 December 1956.

[2] Instrument of ratification deposited for Australia 29 July 1957.

[3] The Statute entered into force for Australia and generally 29 July 1957.

APPENDIX IV

APPENDIX IV

AUSTRALIA, THE "MIDDLE POWER" PARADIGM, AND LIBERAL INTERNATIONAL THEORY

The "interdisciplinary perspective" which links the international lawyer with the international relations theorist through the notion of international rules (outlined in the Introduction to the study) carries the prospect of further research in areas which are not the primary concern of the present study.

The study has argued that Australia played a significant part (previously unacknowledged by scholars) in the initial process of negotiation between the United States, the Soviet Union, and their respective allies which led in 1968 to the opening of the NPT for signature and accession by all states. In this way, Australia was involved in the establishment of a multilateral international law instrument which it regarded as critical to its own, and to world security *as international law*, notwithstanding its initial reluctance to sign and ratify the treaty.

Australia subsequently became a committed and internationally acknowledged champion of global nuclear non-proliferation efforts. With the NPT as their foundation, those efforts have proved relatively successful, whether as legal, political or diplomatic initiatives, in their goal of limiting the spread of nuclear weapons. Thus, Australia's calculus of its national interest has involved, over time, a synthesis of international law, its own acknowledged obligations under that law, and its relations with other states. That synthesis has been vitally important for the ways in which Australia has sought to carry weight in the development of international law on nuclear proliferation both before and after 1968.

Australia's national interest calculations have also been conditioned by its domestic political and constitutional identity. The Australian state is founded on the principles of liberal civil society and constitutional government. Its liberal ethos is embedded within a structure of constitutionally guaranteed democratic rights which comprise individual legal, political, social, economic and other rights.

Australia's liberal constitutional identity, in the context of its aims in the sphere of nuclear proliferation, provides an opportunity for future enquiry into the role of liberal international theory in understanding the evolution of this sector of public international law, and the growth of interdisciplinary scholarship.¹

In terms of the study's assertion of the potential for influence of the "middle powers", the core assumption of a liberal perspective on international relations holds the key to understanding the degree of influence which some middle-ranking states have exhibited. This claim becomes clearer on consideration of the basic assumptions, outlined in 1993 by Slaughter, which are embraced by all liberal theories:

- That "[t]he fundamental actors in politics are members of domestic society, understood as individuals and privately constituted groups seeking to promote their independent interests. Under specified conditions, individual incentives may promote social order and the progressive improvement of individual welfare".
- That "[a]ll governments represent some segment of domestic society, whose interests are reflected in state policy".
- That "[t]he behaviour of states - and hence levels of international conflict and cooperation - reflects the nature and configuration of state preferences".²

Thus, social rather than systemic factors drive state policy and behaviour, those factors are constituted by patterns of individual interest, and "what states do is determined by what they want."³ These parameters underlie liberal international theory (whose history stretches back to the Enlightenment, and to the *laissez-faire* liberalism of Locke, and the democratic liberalism of Rousseau).⁴ So also do the fundamental precepts of the liberal ethos: its gradualism, reason, optimism, egalitarianism, universalism and individualism.

¹ Zaher, M. W. & Matthews, R. A. (1995). Liberal international theory: Common threads, divergent strands. In C. W. Kegley (Jr.) (Ed.), *Controversies in international relations theory: Realism and the Neo-liberal Challenge* (pp. 107 - 150). New York: St. Martin's Press. At pp. 117 - 120.

² Slaughter-Burley, A. (1993). International law and international relations: A dual agenda. 87 *AJIL* 205. At 227, 228.

³ *Ibid.*

⁴ *Supra.* At Note 1, p. 111.

If it is accepted that the liberal quest is for gradually enhanced levels of peace, welfare and justice, realised through international cooperation⁵ it is reasonable to suggest that Australia's stable liberal constitutionalism forms the basis on which it has engaged with, and been engaged by, that world.

Australia has reflected in its international behaviour the influence exerted by, and the goals sought by, individuals and groups - both private and governmental - within it. Their aggregated preferences form a major component of the process by which the Australian state's international preferences and policy are developed and articulated, at home and abroad. However, this causal relationship does not exclude consideration of systemic factors: the pre-existing or evolving matrix of structure, institutions, organisations, issue regimes and understandings within which all states must operate in the international domain. Rather, the influence which Australia demonstrates in its international engagement must be understood as lying *within* and therefore constrained by, entrenched global structures. These assumptions are valid not only in respect of its relations with other Western liberal democracies, but also in its dealings with the many non-liberal and proto-democratic states around the world.

Australia's decisions and actions in the NPT negotiation process have been interpreted in the study within a frame of reference which takes account of both its fundamentally liberal political nature and the structural limits of its international relations policies and outcomes.

In doing so, the study has not discounted the role of international institutions and organisations, whether formal or informal, legally or extra-legally constituted, in international affairs. In fact, they remain, in the study, as vital components of the international system, as do the ultimate political entities through which they work - the nation-states.

RELATED THEORETICAL CONCLUSIONS

A consequent, though subsidiary, conclusion of the study is that the success of the community of knowledge and experience which surrounds, legitimises and operationalises the NPT - its "regime" in the widest sense - suggests that there is an opportunity to use the events under review as an early case study of the processes by

⁵ *Ibid.* At p. 117.

which international law and international politics converge during a period of accelerating change. Those individuals and institutions, both within and outside government, who exercise skills in inspection and verification techniques, diplomacy, international bureaucracy, international law, academic research and so on are less likely to reject rival specialists as irrelevant in circumstances where a wide range of skills are focused on a common set of objectives, such as those of global anti-nuclear proliferation efforts.

The increasing transparency of national borders to the exchange of information, as well as the ability of individuals and groups of individuals around the world to confer at will, allow the possibility that those individuals, institutions and understandings which constitute communities of knowledge in issue areas such as anti-nuclear proliferation will increasingly free themselves from the oversight of the nation-states.⁶ That liberating effect may result in the accelerating convergence of international law with the precepts of international relations theorists under the rubric of international *rules*.

Finally, from the point of view of the individual, it may be that the experience of liberal states, which have tended not to go to war with each other over the past century, can be used as a template for a liberal interdisciplinary exploration of the evolution of international rules between states in the new century. The extension of the internal behaviour of liberal states - importantly, their acknowledgement of the rights and interests of individual citizens - to the wider trans-national sphere may be mirrored by the ways in which rules agreed by the increasingly attenuated nation-states are negotiated and interpreted.

In this way, the convergence of international law and international political action may ultimately be completed through the cession of pre-eminence by the classic "state" to smaller, more numerous and ultimately more functionally skilful entities of many kinds, including the individual.⁷

⁶ Slaughter, A.M. (1997). The real New World Order. *Foreign Affairs*, 76 (5), pp. 183-197. At pp. 183-186.

⁷ *Ibid.*